

EXHIBIT

17

In The Matter Of:

MICROSOFT CORPORATION

v.

MOTOROLA, INC., et al.

ROGER S. SMITH - Vol. 1

August 22, 2012

MERRILL CORPORATION

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1 UNITED STATES DISTRICT COURT FOR THE
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE.
3 CASE NO.: C10-1823-JLR.

-----X
4 MICROSOFT CORPORATION,
5 Plaintiff,

-vs-

6 MOTOROLA MOBILITY, INC.,
7
8 Defendant.

-----X
9
10 August 22, 2012
11 9:13 a.m.
12
13
14

15 Videotaped Deposition of ROGER S. SMITH,
16 held at the offices of Sidley Austin, 787
17 Seventh Avenue, New York, New York, before
18 Danielle Grant, a Shorthand Reporter and
19 Notary Public within and for the State of
20 New York.
21
22

23 Job# 445596
24
25

ROGER S. SMITH - 8/22/2012

1	A P P E A R A N C E S:	1	VIDEOGRAPHER: We are now on the	09:03:20
2		2	record. This is the video operator	09:03:22
3	ROPES & GRAY LLP	3	speaking, Robert Calvert of Merrill	09:03:24
4	Attorneys for the Plaintiff	4	Legal Solutions. Today's date is	09:03:26
5	1211 Avenue of the Americas	5	August 22, 2012, the time on the video	09:03:30
6	New York, New York 10036-8704	6	monitor is 9:03 a.m. We are at the	09:03:32
7	BY: STEVEN PEPE, ESQ.	7	offices of Sidley Austin located at 787	09:03:38
8	(212) 596-9000	8	Seventh Avenue, New York, New York to	09:03:40
9	steven.pepe@ropesgray.com	9	take the videotaped deposition of Roger	09:03:43
10	SIDLEY AUSTIN LLP	10	Smith in the matter of Microsoft	09:03:45
11	Attorneys for the Defendant	11	Corporation, a Washington Corporation	09:03:47
12	1 South Dearborn	12	versus Motorola Inc., Motorola --	09:03:49
13	Chicago, Illinois 60603	13	excuse me, Motorola Mobility Inc. and	09:03:54
14	BY: NOT PRESENT, ESQ.	14	General Instrument Corporation. The	09:03:55
15	-and-	15	venue of this case is the United States	09:03:57
16	CALFO HARRIGAN LEYH & EAKES	16	District Court for the Western District	09:03:59
17	999 Third Avenue, Suite 4400	17	of Washington at Seattle. The index	09:04:03
18	Seattle, WA 98104	18	number is C10-1823-JLR.	09:04:10
19	BY: CHRISTOPHER WION, Esq., Of Counsel	19	Will counsels please voice	09:04:10
20	206-623-1700	20	identify themselves and state whom they	09:04:10
21	206-623-8717 (fax)	21	represent.	09:04:12
22	chrisw@calfoharrigan.com	22	MR. WION: Chris Wion with Calfo	09:04:12
23		23	Harrigan representing Microsoft.	09:04:19
24		24	MR. PEPE: Steve Pepe of Ropes and	09:04:19
25		25	Gray on behalf of Motorola.	
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1	-----INDEX-----	1	VIDEOGRAPHER: Will our court	09:04:23
2	WITNESS EXAMINATION BY PAGE	2	reporter please swear in the witness.	09:04:25
3	ROGER S. SMITH MR. WION 5	3	R O G E R S M I T H, called as a witness, having	09:04:25
4		4	been first duly sworn by Danielle Grant, a	09:04:25
5	-----EXHIBITS-----	5	Notary Public within and for the State of	09:04:25
6	FOR IDENTIFICATION DESCRIPTION PAGE	6	New York, was examined and testified as	09:04:25
7	Exhibit No. 330 Expert Report of Roger 13	7	follows:	09:04:25
8	Smith	8	VIDEOGRAPHER: Please begin.	09:04:25
9	Exhibit No. 331 Document 121	9	EXAMINATION BY	09:04:25
10	Exhibit No. 332 Excerpt of prior 138	10	MR. WION:	09:04:37
11	testimony from June 17,	11	Q Good morning Mr. Smith?	09:04:38
12	2003	12	A Good morning.	09:04:39
13		13	Q Can you please your full name and	09:04:39
14		14	home address for the record.	09:04:41
15		15	A My name is Roger S. Smith and my	09:04:43
16	-----REQUESTS FOR PRODUCTION-----	16	home address is 7258 Marlow Place in University	09:04:49
17	DESCRIPTION PAGE	17	Park, Florida.	09:04:50
18	-----NONE WERE MADE-----	18	Q And I understand you have been	09:04:51
19		19	deposed on a number of prior occasions; is that	09:04:54
20		20	right?	09:04:55
21		21	A I have, yes.	09:04:56
22		22	Q Approximately how many times?	09:04:58
23		23	A I would -- I don't keep close	09:05:00
24		24	track but I would judge it's somewhere between	09:05:04
25		25	15 and 30.	
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1	Q And when were you most recently	09:05:09	1	makes decision on a case-by-case basis whether	09:07:24
2	deposed?	09:05:10	2	it's in their interest or not in their interest	09:07:29
3	A My most recent deposition would	09:05:13	3	to join a pool.	09:07:31
4	have been in 2009, probably in connection with	09:05:19	4	Q Were there any factors that he	09:07:32
5	a lawsuit between Lucent and Dell Gateway and	09:05:25	5	discussed with you relating to how Motorola	09:07:34
6	Microsoft.	09:05:26	6	would make that determination?	09:07:36
7	Q And of this 15 to 30 depositions,	09:05:29	7	A Well, he did, he did discuss with	09:07:37
8	approximately how many -- for approximately how	09:05:33	8	me the fact that Motorola looks at whether the	09:07:43
9	many of those were you serving as an expert	09:05:36	9	pool has to do with important strategic	09:07:48
10	witness?	09:05:37	10	technology or with less important technology.	09:07:52
11	A In each one of them I was serving	09:05:39	11	Q Did he explain to you what	09:07:54
12	as an expert.	09:05:40	12	Motorola considered to be important technology	09:07:57
13	Q Have you spoken with any Motorola	09:05:43	13	as opposed to non-important technology with	09:08:00
14	employees in connection with this case?	09:05:45	14	respect to Motorola's strategies?	09:08:04
15	A I have, yes.	09:05:46	15	A I do not recall that he identified	09:08:09
16	Q Which employees?	09:05:48	16	specific technologies as so important that they	09:08:13
17	A I have spoken with a gentleman	09:05:51	17	would not join a pool in connection with them.	09:08:16
18	whose name is Kowalski, I think it is Timothy	09:05:55	18	But he did, he did talk about their core	09:08:20
19	Kowalski, and I have spoken with, oh goodness,	09:06:05	19	technologies, whatever those might be.	09:08:22
20	Tim, the Motorola's general patent counsel I	09:06:09	20	Q Did he identify what those core	09:08:25
21	guess, when I was being interviewed for being	09:06:13	21	technologies would be?	09:08:29
22	retained.	09:06:15	22	A I don't at this point recall that	09:08:31
23	MR. PEPE: Tom.	09:06:17	23	he did. He may have.	09:08:35
24	THE WITNESS: Tom, sorry, Tom.	09:06:17	24	Q And on the flip side, did he	09:08:38
25	MR. PEPE: Tom Miller.		25	identify what non-core technologies would	
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1	THE WITNESS: Miller? Miller,	09:06:18	1	encompass?	09:08:42
2	yeah.	09:06:19	2	A He did identify one as I remember	09:08:45
3	Q And since that initial meeting	09:06:21	3	because I didn't understand the acronym was	09:08:48
4	with Mr. Miller, have you had any other	09:06:24	4	NFC, near field something.	09:08:53
5	discussions with Mr. Miller?	09:06:26	5	MR. PEPE: Communications.	09:08:54
6	A I have not.	09:06:26	6	A Communications, yeah.	09:08:56
7	Q So the only Motorola employee with	09:06:29	7	Q Do you have an understanding of	09:08:56
8	which you've discussed the substance of this	09:06:31	8	what that means today?	09:08:58
9	case other than in the initial meeting was Mr	09:06:34	9	A No.	09:08:59
10	Tim Kowalski?	09:06:37	10	Q Did Mr. Kowalski explain to you	09:09:01
11	A That's correct.	09:06:39	11	why Motorola had or had not joined any	09:09:06
12	Q How many times did you speak with	09:06:40	12	particular patent pool?	09:09:09
13	Mr. Kowalski?	09:06:42	13	A We did discuss the fact that	09:09:11
14	A I spoke with Mr. Kowalski once for	09:06:45	14	Motorola at one time had joined, I think it was	09:09:15
15	approximately a half an hour, I would say,	09:06:46	15	the MPEG-2 pool, but that they later sold the	09:09:21
16	maybe an hour.	09:06:48	16	patents, if I remember the pool correctly, they	09:09:24
17	Q What did you discuss with	09:06:50	17	sold the pools to General Electric and had no	09:09:28
18	Mr. Kowalski?	09:06:51	18	further interest in that pool.	09:09:31
19	A Our discussions centered around	09:06:54	19	Q When Motorola joined the MPEG-2	09:09:35
20	Motorola's activities and attitudes concerning	09:07:03	20	pool, do you have any understanding regarding	09:09:37
21	the joining of pools or not joining pools.	09:07:07	21	why?	09:09:38
22	Q What did he tell you about that?	09:07:10	22	A No, I do not.	09:09:40
23	A As I reported in my report, he	09:07:12	23	Q Did Mr. Kowalski explain to you	09:09:42
24	told me that Motorola looks at each pool	09:07:18	24	the rationale for Motorola's decision to join	09:09:45
25	opportunity as an individual opportunity and		25	or not join in any other patent pools other	
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1	than MPEG-2?	09:09:53	1	A I don't believe I have. I don't	09:12:37
2	A His -- in connection with pools	09:09:55	2	do much in the way of publishing.	09:12:40
3	that they, that as I said, they would elect not	09:09:58	3	Q Is your answer the same with	09:12:42
4	to join because the technology was one that	09:10:03	4	respect to standards more generally?	09:12:45
5	they felt that they were -- they were better	09:10:05	5	A It would be the same, yes.	09:12:52
6	off managing on their own outside of a pool. I	09:10:11	6	Q Have you written any papers,	09:12:54
7	don't recall that he -- that he gave me any	09:10:16	7	articles, anything else relating to RAND?	09:13:05
8	specific direction with respect to the answer	09:10:19	8	A Not that I can recall. As I say,	09:13:07
9	to your question.	09:10:22	9	I have not -- I have not made a practice of	09:13:13
10	Q In other words, he did not provide	09:10:23	10	writing articles and the like so I'm quite sure	09:13:17
11	you any information regarding why Motorola	09:10:28	11	I have not.	09:13:18
12	joined or did not join any specific patent pool	09:10:31	12	Q And this also includes any	09:13:21
13	as opposed to general considerations?	09:10:35	13	writings that were internal at IBM during your	09:13:25
14	MR. PEPE: Objection, form.	09:10:35	14	career there?	09:13:27
15	Go ahead.	09:10:37	15	A Well, certainly during my career	09:13:29
16	A I don't recall that he did, no.	09:10:39	16	at IBM I prepared memoranda or legal opinions	09:13:36
17	Q Have you had any discussions with	09:10:42	17	concerning patent issues and issues relating to	09:13:40
18	any of Motorola's other experts regarding this	09:10:45	18	standards I'm sure were included.	09:13:43
19	case?	09:10:47	19	Q And as well as memoranda relating	09:13:46
20	A I have not had personal	09:10:49	20	to patent pools?	09:13:49
21	discussions with other Motorola experts.	09:10:57	21	A I cannot recall specific	09:13:52
22	Q So other than counsel for Motorola	09:10:59	22	memoranda, but I would -- I would be surprised	09:13:55
23	and Mr. Kowalski, have you discussed the	09:11:01	23	if I had not written some memoranda that	09:13:58
24	substance of this case with anyone else?	09:11:03	24	mentioned patent pools.	09:14:05
25	A No, I have not.		25	Those of course would be internal	
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1	Q When were you engaged by Motorola	09:11:09	1	memoranda that would be confidential.	09:14:10
2	in this matter?	09:11:11	2	Q You can't recall any such	09:14:13
3	A I was engaged on Friday the 13th	09:11:14	3	memoranda or other writings where the main	09:14:15
4	of July. I signed an engagement letter. I	09:11:19	4	subject was patent pools?	09:14:19
5	had -- I had interviewed with Mr. Muller,	09:11:22	5	A Not as I sit here today, no.	09:14:21
6	Miller, previous to that I think on a	09:11:26	6	MR. WION: This is Plaintiff's	09:14:21
7	Wednesday.	09:11:27	7	Exhibit 330.	
8	Q Approximately how much time have	09:11:28	8	(Expert Report of Roger Smith was	
9	you spent working on this matter?	09:11:33	9	marked as Plaintiff's Exhibit No.	
10	A Oh dear, I have not kept careful	09:11:35	10	330 for identification, as of this	
11	count, but I would judge at this point it is	09:11:39	11	date.)	09:15:07
12	somewhere between 60 and -- 60 to 80 hours	09:11:45	12	Q Mr. Smith, you have been handed	09:15:08
13	perhaps.	09:11:48	13	what's been marked as Plaintiff's Exhibit 330	09:15:11
14	Q And prior to the issuance of your	09:11:52	14	Can you review that quickly and determine --	09:15:16
15	expert report on August 10, how many hours had	09:11:57	15	and confirm that that is the expert report you	09:15:18
16	you spent working on this matter?	09:12:03	16	prepared in this case?	09:15:34
17	A I would say probably 60 hours.	09:12:11	17	A Well, I'm obviously not going to	09:15:38
18	Q Have you previously written about	09:12:14	18	read each page, but it certainly appears to be	09:15:41
19	patent pools?	09:12:17	19	my expert report.	09:15:42
20	A I have -- I have considered patent	09:12:18	20	Q And does your expert report	09:15:44
21	pools in connection with earlier expert	09:12:21	21	describe all of the opinions that you have	09:15:46
22	reports.	09:12:22	22	developed in this case?	09:15:48
23	Q Other than any expert reports that	09:12:25	23	A It does, yes.	09:15:49
24	you've prepared, have you otherwise written	09:12:32	24	Q Accurately?	09:15:50
25	anything regarding patent pools?		25	A I believe so, yes.	
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1	Q And completely?	09:15:54	1	articles.	09:18:59
2	A I believe so, yes.	09:15:56	2	Q You're not an economist; is that	09:19:02
3	Q Do you have any plans to	09:15:58	3	right?	09:19:02
4	supplement this report?	09:16:01	4	A That is absolutely correct.	09:19:10
5	A Not unless some new material	09:16:06	5	Q Can you describe generally what	09:19:12
6	appears that relates to the report and I'm	09:16:10	6	you considered your assignment to be in	09:19:14
7	asked to do so.	09:16:11	7	preparing your expert report in this case?	09:19:16
8	Q Have you been asked to prepare any	09:16:13	8	A Well, I think it's described in my	09:19:19
9	supplemental report?	09:16:16	9	report. At a high level I could say I was	09:19:25
10	A I have not, no.	09:16:17	10	asked to look at the reports of the experts	09:19:31
11	Q Other than documents that were	09:16:19	11	that were reporting on behalf of Microsoft and	09:19:36
12	provided to you by counsel, are there any other	09:16:22	12	to give my opinion concerning the accuracy of	09:19:40
13	documents that you relied on in preparing this	09:16:25	13	their reports, and more specifically the	09:19:46
14	analysis in your expert report?	09:16:29	14	relationship or non-relationship or relevance	09:19:50
15	A I cannot recall any other	09:16:31	15	or non-relevance of patent pools to the	09:19:53
16	documents.	09:16:37	16	determination of a reasonable and	09:19:56
17	Q If you turn to tab A of your	09:16:40	17	nondiscriminatory royalty rate and bilateral	09:20:00
18	report, that is a list -- or excuse me. Is	09:16:46	18	negotiation.	09:20:01
19	that a list that includes all of the documents	09:16:51	19	Q Which expert reports of	09:20:03
20	that you relied on in forming your opinions?	09:17:25	20	Microsoft's experts do you recall reading?	09:20:06
21	A It appears to be, yes.	09:17:27	21	A I read -- I read very briefly five	09:20:09
22	Q Were you familiar with any of the	09:17:28	22	reports. I concentrated more on three and	09:20:12
23	documents listed in tab A prior to your	09:17:31	23	those were the reports of a Dr. Simco, a	09:20:17
24	engagement by Motorola for this case?	09:17:38	24	Dr. Murphy and I believe, or they may have been	09:20:21
25	MR. PEPE: Objection, form.		25	professors, and a Mr. , Dr. Lind.	
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1	A As I sit here, I cannot recall	09:17:45	1	Q And you referred to an additional	09:20:29
2	being familiar with any of the specific	09:17:49	2	two other expert reports?	09:20:30
3	documents. I may well have read some of MPEP	09:17:54	3	A Yes, I was provided with the	09:20:32
4	LA's materials before seeing them here.	09:17:58	4	package of all of their expert reports and I	09:20:35
5	Q There are a number of articles	09:18:00	5	believe they included a Mr. or Dr. Orchard, and	09:20:40
6	relating to economic matters in the materials	09:18:03	6	I've kind of forgotten the last name.	09:20:45
7	listed; is that correct?	09:18:05	7	MR. PEPE: Gibson.	09:20:46
8	A I see them, yes, um-hmm.	09:18:08	8	THE WITNESS: Gibson, correct, but	09:20:48
9	Q Were you familiar with those	09:18:09	9	I didn't pay particular attention to	09:20:50
10	articles prior to this case?	09:18:12	10	them because they didn't seem to relate	09:20:52
11	MR. PEPE: Objection, form.	09:18:15	11	to the issue I was asked to opine on.	09:20:55
12	A I don't recall specifically being	09:18:17	12	Q Other than those five experts	09:20:57
13	familiar with them. I may have read some of	09:18:19	13	reports, were there any other expert reports	09:20:59
14	them. I -- Mark Lemley, for example, is	09:18:23	14	that you read?	09:21:00
15	well-known to me and I may have read some of	09:18:26	15	A Yes, I read the expert report of	09:21:03
16	his materials while I was associated with the	09:18:30	16	Dr. Teece was his name. T-E-E-C-E. And a Dr.	09:21:08
17	American Intellectual Property Law Association.	09:18:33	17	Beckers. I may have read others but I don't	09:21:14
18	Q And during what period of time	09:18:35	18	recall them at the moment.	09:21:16
19	were you involved with that organization?	09:18:37	19	Q Do you recall reading any of	09:21:18
20	A From about 1983 until about 2000,	09:18:45	20	Motorola's expert reports other than what	09:21:22
21	something like that.	09:18:46	21	you've referred to as the Teece report?	09:21:27
22	Q So are there any economic articles	09:18:47	22	A I read Charles Donohue's report	09:21:31
23	in this list that you can recall reviewing or	09:18:50	23	and I may have read Dr. Smallency, if that's	09:21:37
24	reading prior to your engagement in this case?	09:18:55	24	the way you pronounce his name. At least	09:21:41
25	A No, I cannot recall any specific		25	portions of his report.	
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1	Q Did you read the entire Donohue report?	09:21:46	1	either of these two letters?	09:25:15
2	A I skimmed the entire Donohue report, but there was much of it that I didn't think was pertinent to my issue.	09:21:49	2	A I certainly do recall seeing them. I read them. I don't know that I concentrated very strongly on them. They were among the materials that were provided to me.	09:25:18
3	Q Were there portions of that report that you believed were pertinent to the issues you were investigating?	09:21:52	3	Q So when you refer to Motorola's offer, were you thinking of one or both of these letters?	09:25:21
4	A He spoke very briefly or reported very briefly on the relevance of pools to determination of a reasonable and a nondiscriminatory royalty rate, and I read that.	09:21:55	4	A I was really thinking of the first one. I don't remember the extent to which, if any, that the offer changed.	09:25:23
5	Q Any other portions of Mr. Donohue's report that you recall focusing attention on?	09:21:59	5	Q Turning back to your expert report and tab C of that report. That appears to be a list of cases in which you provided testimony over the last four years?	09:25:26
6	A No. As I remember, the balance or the -- most of the substance of his report had to do with application of Georgia Pacific factors to his issue.	09:22:02	6	A Yes. I have to correct that. It includes testimony prior to four years. I think the testimony within the four-year period is cited in the body of the report. I didn't -- I wasn't particularly careful I guess in the heading of C.	09:25:29
7	Q Did you consider the application of Georgia Pacific factors to be relevant to the assignment you were engaged in?	09:22:04	7	Q So for what time period was this list intended to cover?	09:25:32
8	A No, I did not.	09:22:08	8	A This list would cover the time period from about 2004, I think, or 2005,	09:25:33
9	Q Were you asked to develop an	09:22:10	9		09:25:36
10		09:22:15	10		09:25:39
11		09:22:21	11		09:25:56
12		09:22:22	12		09:25:58
13		09:22:25	13		09:26:09
14		09:22:28	14		09:26:13
15		09:22:33	15		09:26:15
16		09:22:35	16		09:26:20
17		09:22:37	17		09:26:22
18		09:22:41	18		09:26:24
19		09:22:44	19		09:26:28
20		09:22:54	20		09:26:30
21			21		09:26:35
22		Page 18	22		09:26:38
23			23		09:26:41
24			24		09:26:42
25			25		Page 20
1	opinion on whether Motorola's demands on Microsoft were consistent with RAND principles?	09:22:59	1	something like that.	09:26:51
2	MR. PEPE: Objection to form.	09:23:06	2	Q And is it complete with respect to identifying each case in which you provided testimony since 2004, 2005?	09:26:52
3	A No, I was not asked specifically to -- to opine on the -- the question of whether Motorola's offer was or was not within RAND principles.	09:23:07	3	A It is, to the best of my knowledge, complete. I cannot recall any -- any deposition or testimony that is not listed here.	09:26:55
4	Q When you refer to Motorola's offer can you describe for me what you mean?	09:23:09	4	Q Are there any cases listed in tab C that involved your examination of patent pools?	09:26:58
5	A Well, I read -- I read at least one letter that was written to Microsoft by a gentleman whose name was Daley, Kirk Daley, I believe, that contained an offer, the original offer for a negotiation.	09:23:14	5	A Yes.	09:27:00
6	Q Mr. Smith, I have now handed you two exhibits that have been previously marked. The first is Plaintiff's Exhibit No. 1.	09:23:21	6	Q Can you identify those, please?	09:27:06
7	A Um-hmm.	09:23:22	7	A Item No. 10, Lucent against Gateway involved patent pools. Item 11, Lucent against -- Lucent and Multimedia against Gateway et al involved patent pools. I don't recall Item 12 did, although they were the same parties.	09:27:10
8	Q Which is a letter from Mr. Daley of Motorola to Mr. Gutierrez at Microsoft dated October 21, 2010. And the second document identified as Plaintiff's Exhibit 2 is a letter from the same Mr. Daley to Mr. Gutierrez dated October 29, 2010.	09:23:24	8	Q And so the cases on this list identified as one through nine did not involve patent pools?	09:27:13
9	Do you recall seeing and reading	09:23:28	9	A I don't believe they did. Let me look at it again to make sure about it.	09:27:18
10		09:23:32	10	Item No. 3 may have had something	09:27:23
11		09:23:37	11		09:27:26
12		09:23:43	12		09:27:28
13		09:23:50	13		09:27:30
14		09:24:32	14		09:27:34
15		09:24:35	15		09:27:39
16		09:24:36	16		09:27:43
17		09:24:40	17		09:27:47
18		09:24:44	18		09:27:51
19		09:24:48	19		09:27:53
20		09:24:54	20		09:27:57
21		09:24:57	21		09:28:01
22		09:25:01	22		09:28:03
23		09:25:08	23		09:28:05
24		09:25:10	24		09:28:19
25		Page 19	25		Page 21

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1	to do with patent pools. That was a -- that	09:28:27	1	I think probably was in the first half and I	09:31:27
2	was an International Trade Commission case and	09:28:35	2	think the -- I cannot recall the name of the	09:31:33
3	I don't think -- I don't think the arrangement	09:28:42	3	case I'm thinking of right now but that was in	09:31:37
4	was strictly a patent pool but as I remember it	09:28:47	4	1930s something, Supreme Court opinion relating	09:31:42
5	may have had some characteristics. I do	09:28:50	5	to pools.	09:31:49
6	remember in connection with that case reading	09:28:53	6	Q And do you recall there being some	09:31:52
7	Garhert Bini's (ph), one of his reports, one of	09:28:56	7	opposition to technology relating to, I think	09:31:55
8	his letters to the Justice Department. That's	09:28:58	8	it was laser eye surgery, VISX?	09:32:00
9	why I make the connection.	09:29:03	9	A That's a more recent case, yes,	09:32:03
10	Q And that letter that you are	09:29:04	10	VISX.	09:32:05
11	referring to, what was the date or approximate	09:29:07	11	Q VISX was it?	09:32:05
12	date that that letter was sent?	09:29:10	12	A Yeah, um-hum.	09:32:06
13	A Gosh, it would have had -- it	09:29:12	13	Q Do you recall when that was?	09:32:07
14	would have had to be probably in the late '90s.	09:29:17	14	A That would have been -- that would	09:32:09
15	Q Can you recall the substance of	09:29:19	15	have been probably subsequent to 1990.	09:32:23
16	that letter?	09:29:21	16	Q Do you recall what the DOJ's	09:32:25
17	A To the best of my recollection	09:29:22	17	reaction was to Mr. Bini's letter?	09:32:32
18	that letter would have had to do with a	09:29:28	18	MR. PEPE: Objection, form.	09:32:32
19	business evaluation by the Justice Department	09:29:31	19	Go ahead.	09:32:38
20	of a pool. I don't -- it certainly was not --	09:29:35	20	A My recollection is that the	09:32:39
21	not a pool that was involved directly in the	09:29:38	21	Department Of justice through Joel Klein	09:32:46
22	ITC case.	09:29:41	22	advised Mr. Bini that as with respect to what	09:32:51
23	Q Do you have any understanding why	09:29:45	23	they had been given to understand they did not	09:32:55
24	Mr. Bini's letter was requesting a back from	09:29:51	24	plan to challenge that pool at that time.	09:33:01
25	the DOJ?		25	Q Do you recall whether that was an	
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1	A Well, as I remember the letter	09:29:58	1	MPEG-2 pool?	09:33:15
2	identified a collective arrangement of pool	09:30:03	2	A I -- I thought it had to do with	09:33:18
3	that was being formed or had been formed and	09:30:09	3	DVDs, but it may have been. If the case I was	09:33:21
4	was requesting that the Justice Department make	09:30:14	4	involved in, the is that correct case I was	09:33:22
5	an evaluation as to whether they would or would	09:30:17	5	involved had to do with DVDs.	09:33:33
6	not challenge that as an antitrust violation.	09:30:22	6	Q Other than -- strike that.	09:33:35
7	Q Had the DOJ previously challenged	09:30:25	7	Are you aware of any other	09:33:38
8	patent pools?	09:30:26	8	technology patent pools which formation was	09:33:47
9	A Yes, they had over the years.	09:30:30	9	reviewed by DOJ?	09:34:00
10	Q Can you think of any particular	09:30:32	10	A Technologies other than	09:34:02
11	pools that were challenged by the DOJ?	09:30:38	11	electronics or can you be more specific?	09:34:05
12	A Manufactured Aircraft Association,	09:30:39	12	Q Well, you had referred to I think	09:34:08
13	I think that pool was challenged. I think some	09:30:43	13	some oil company and airplane manufacturing	09:34:13
14	of the -- some of the pools, they're all oil	09:30:50	14	pools and we had discussed briefly a pool	09:34:17
15	company pools. In fact I think I refer to one	09:30:53	15	relating to I think laser eye surgery. So when	09:34:21
16	of them in my report.	09:31:04	16	I refer to technology, that's the industry	09:34:24
17	Q Were these investigations or	09:31:06	17	that's -- I think you're more familiar with.	09:34:26
18	objections by the DOJ that you just referred to	09:31:08	18	Can you recall any patent pools relating to	09:34:31
19	in the first half of last century?	09:31:17	19	high technology that were reviewed by the DOJ?	09:34:38
20	A The first half of the last	09:31:18	20	MR. PEPE: Objection, form.	09:34:39
21	century?	09:31:19	21	A As I sit here, I cannot recall any	09:34:42
22	Q Or if you can tell me	09:31:20	22	specific instances of pools that were, that	09:34:49
23	approximately the date or decade, that would be	09:31:21	23	were evaluated by the Justice Department. The	09:34:53
24	helpful.	09:31:22	24	only other one that comes to mind has to do	09:34:57
25	A Well, yeah, Aircraft Manufacturers		25	with bathtub porcelainizing or something like	
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1	that.	09:35:01	1	sure. It's just been too many years ago and I	09:38:12
2	Q We can probably agree that doesn't	09:35:04	2	don't recall the specifics of the case.	09:38:17
3	fall in the high technology industry.	09:35:07	3	Q Do you recall whether there was	09:38:19
4	A It depends whether you're making	09:35:10	4	any standard setting organization that had	09:38:25
5	bathtubs I guess.	09:35:15	5	promulgated a standard at issue in that case?	09:38:30
6	Q Can you think of any technology	09:35:17	6	A No, I don't, I don't remember any	09:38:31
7	patent pools that existed prior to late 1990s?	09:35:27	7	of the details.	09:38:41
8	A I'm not sure I understand the	09:35:29	8	Q Do you recall whether Phillips was	09:38:42
9	question. Can I think of?	09:35:31	9	subject to any RAND requirements in licensing	09:38:44
10	Q Can you identify for me any patent	09:35:34	10	its technology?	09:38:47
11	pools relating to high technology that existed	09:35:38	11	A No, I do not.	09:38:58
12	at some point prior to the, let's say prior to	09:35:43	12	Q To clarify, you don't recall one	09:39:00
13	1997?	09:35:44	13	way or the other?	09:39:02
14	A As I sit here today, I cannot	09:35:47	14	A That's correct.	09:39:07
15	recall any specific pools, no.	09:35:57	15	Q So other than Items 3, 10, 11 and	09:39:12
16	Q You mentioned in this case	09:35:59	16	12, none of these other cases involved your	09:39:15
17	identified as Item 3 on your tab C list of	09:36:03	17	analysis of patent pools?	09:39:18
18	cases, that it may have involved a patent pool	09:36:08	18	A I think that is correct.	09:39:28
19	but I believe you said you weren't quite	09:36:11	19	Q And can you recall any earlier	09:39:30
20	certain whether it qualified as a patent pool?	09:36:15	20	cases that do not appear on this list in which	09:39:34
21	A Yes, that -- you're correct, I'm	09:36:17	21	you provided analysis of patent pools?	09:39:37
22	not certain and in fact the -- the organization	09:36:27	22	A I do not recall any such cases.	09:39:46
23	that was licensing the patents was Phillips of	09:36:33	23	Q Can you recall any patent pools	09:39:48
24	Netherlands and I don't, I believe they may	09:36:37	24	that you evaluated during your time at IBM?	09:39:53
25	have collected patents from others but I'm not		25	A We considered patent pools in	
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1	sure.	09:36:41	1	connection with many standards. You must	09:39:58
2	Q So, what is your definition -- I'm	09:36:45	2	understand that IBM participated in -- in all	09:40:02
3	trying to understand why you would not consider	09:36:47	3	of the standards organizations. We had a	09:40:08
4	that a patent pool so can you provide your	09:36:50	4	standards group, and so whenever a standard was	09:40:13
5	definition of a patent pool?	09:36:53	5	under consideration and we had patents relating	09:40:16
6	A Well, my definition of a patent	09:36:57	6	to the standard, the -- the question of whether	09:40:22
7	pool is -- is a collective arrangement	09:37:01	7	a pool might or might not be useful, whether a	09:40:26
8	organized by two or more patent owners in	09:37:06	8	pool was in existence or being formed, I don't	09:40:29
9	accordance with which they agree to license	09:37:11	9	recall specific ones as I sit here. And I'm	09:40:33
10	their patents relative to a specific subject	09:37:16	10	not sure that I would be permitted by IBM	09:40:39
11	collectively for a single royalty to all	09:37:20	11	confidentiality requirements to discuss	09:40:43
12	interested applicants.	09:37:22	12	specific ones.	09:40:51
13	Q And what was it about the Phillips	09:37:24	13	Q Can you recall any general	09:40:52
14	arrangement that would disqualify it from your	09:37:28	14	categories of technology in which these patent	09:40:57
15	definition of a patent pool?	09:37:29	15	pools or these discussions surrounding patent	09:40:59
16	A Well, I don't know that it would	09:37:31	16	pools at IBM revolved around?	09:41:03
17	or would not. My answer with respect to that	09:37:34	17	A Well, we -- we considered	09:41:05
18	issue was that I don't recall whether Phillips	09:37:37	18	standards in areas, for example, of bus	09:41:12
19	was licensing just its own patents or its	09:37:41	19	protocols for -- for computers, input/output	09:41:22
20	patents and those of others.	09:37:45	20	devices, inner connections, cryptography --	09:41:25
21	Q Do you recall whether the	09:37:49	21	cryptography, those kinds of things.	09:41:36
22	technology at issue related to a standard?	09:37:57	22	Q Anything else you would add to	09:41:39
23	A Well, the term "orange book" comes	09:38:00	23	that list of three?	09:41:40
24	to mind and I think the orange book had to do	09:38:04	24	A As I sit here at the moment, I	09:41:42
25	with an international standard, but I'm not		25	cannot identify any others, so there may well	
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1	have been.	09:41:50	1	certainly items that can draw the attention of	09:45:31
2	Q No, my question was asking about	09:41:52	2	the Justice Department.	09:45:34
3	IBM's consideration of patent pools and I	09:41:56	3	Q Were IBM's circumstances in the	09:45:37
4	believe your answer said that IBM had	09:41:59	4	'70s and '80s that you just referred to, a	09:45:41
5	considered standards in these areas; is that	09:42:02	5	primary consideration in IBM's decision not to	09:45:45
6	correct?	09:42:03	6	join a patent pool?	09:45:50
7	A Yes, we were involved with	09:42:05	7	MR. PEPE: Objection, form.	09:45:51
8	standards in those areas and in connection with	09:42:10	8	A They were -- they were an	09:45:52
9	our review of standards the question of whether	09:42:13	9	important consideration. Whether they were	09:45:54
10	a patent pool was or was not appropriate for	09:42:18	10	primary or not, I cannot say.	09:45:57
11	IBM would have come up and did come up from	09:42:22	11	Q While you were at IBM, IBM in fact	09:46:02
12	time to time.	09:42:24	12	never joined a patent pool; is that correct?	09:46:04
13	Q You can't recall in -- you can't	09:42:26	13	A To my recollection, IBM never	09:46:08
14	recall a specific instance in which the issue	09:42:28	14	joined a patent pool during my period of	09:46:13
15	about patent pools arose?	09:42:33	15	employment.	09:46:14
16	MR. PEPE: Objection,	09:42:33	16	Q Can you identify any patent pool	09:46:15
17	mischaracterizes his testimony.	09:42:35	17	that IBM considered joining but ultimately did	09:46:19
18	A As I said, I don't believe that it	09:42:43	18	not join?	09:46:23
19	would be appropriate for me to identify	09:42:47	19	A I cannot because I don't believe	09:46:27
20	specific ones that might have been at issue.	09:42:49	20	we ever got very far down the path of thinking	09:46:31
21	Q The question's a little different.	09:42:52	21	about joining any patent pool.	09:46:35
22	Can you recall any specific patent pools?	09:43:09	22	Q And why was that?	09:46:38
23	A As I sit here today, I cannot	09:43:12	23	A Because, as I just said, we -- we	09:46:42
24	recall a specific patent pool.	09:43:18	24	were concerned about drawing the attention of	09:46:46
25	Q Can you recall any other companies		25	the Justice Department. We did not believe	
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1	that IBM would have been conferring with	09:43:28	1	that it was necessary for us to belong to a	09:46:56
2	regarding potential creation of a patent pool?	09:43:34	2	pool to manage our intellectual property. We	09:47:03
3	A Our standards organization and our	09:43:38	3	had a -- had a fine licensing organization that	09:47:07
4	research and development organizations	09:43:41	4	was perfectly capable of licensing without	09:47:10
5	participated in standards meetings and	09:43:45	5	worrying about pools.	09:47:13
6	standards committee meetings, and of course	09:43:53	6	Q You retired from IBM in 1994?	09:47:17
7	many of our competitors were members of those	09:43:57	7	A Correct, 1st of November.	09:47:21
8	SSOs, and so undoubtedly there were -- there	09:44:02	8	Q Did the antitrust concerns change	09:47:28
9	were discussions among those folks. Although	09:44:10	9	after you left IBM?	09:47:30
10	don't, I can't identify specific companies nor	09:44:15	10	MR. PEPE: Objection, form.	09:47:32
11	do I think it would be appropriate to.	09:44:23	11	A They -- I think whether the	09:47:35
12	Q What can you tell us about the	09:44:25	12	concerns changed, I don't know. I can tell you	09:47:40
13	patent pools that IBM considered during your	09:44:28	13	that the concerns about IBM's posture as an	09:47:45
14	tenure at the company?	09:44:31	14	antitrust violator changed because that	09:47:50
15	A What I can tell you is that our	09:44:33	15	antitrust suit by the government was dropped,	09:47:53
16	attitude during my tenure as assistant general	09:44:40	16	and I had forgotten when, sometime mid '80s, I	09:47:58
17	counsel in charge of intellectual property was	09:44:43	17	think.	09:48:00
18	that we did not favor patent pools, we did not	09:44:48	18	It may well be that the antitrust	09:48:04
19	believe that IBM needed to participate in	09:44:53	19	department's attitude changed. I think it	09:48:08
20	patent pools, and that we were concerned -- you	09:45:01	20	probably did because the -- early on you may --	09:48:13
21	must remember that during -- during the '70s	09:45:10	21	well, you may be too young to recall but the	09:48:17
22	and '80s we were the defendant in -- in a major	09:45:15	22	nine no-nos that were always talked about by	09:48:22
23	antitrust suit by the government and of course	09:45:19	23	the patent management by the Justice Department	09:48:24
24	we wanted to steer as far away from antitrust	09:45:24	24	folks, you don't remember hearing much about	09:48:28
25	issues as we could, and patent pools are		25	those in the '90s.	
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1	Q So would you agree that the DOJ	09:48:40	1	A That would be the time period in	09:52:17
2	and FTC changed their attitude towards patent	09:48:45	2	which I would have limited my activities to	09:52:19
3	pools in the late 1990s?	09:48:49	3	some of the more important cases. Earlier on I	09:52:22
4	MR. PEPE: Objection, form.	09:48:50	4	think I did participate in early licensing.	09:52:28
5	A I don't know that I'm in a	09:48:52	5	Q But most of your drafting occurred	09:52:32
6	position to agree or disagree with that. I --	09:48:55	6	prior to 1992?	09:52:34
7	I -- I know that the Justice Department now	09:49:02	7	A That is correct, yeah.	09:52:46
8	is -- finds some patent pools to be	09:49:07	8	Q When you left IBM in 1994, do you	09:52:50
9	procompetitive.	09:49:11	9	recall what IBM's approximate annual royalty	09:52:55
10	Q Would you say that antitrust	09:49:11	10	revenues from its licensing program were?	09:52:59
11	agencies -- I'll refer to the antitrust	09:49:14	11	A It was in excess of a billion	09:53:01
12	agencies as the DOJ and FTC so the antitrust	09:49:17	12	dollars and we were very proud of that.	09:53:05
13	agencies are more receptive to patent pools	09:49:24	13	Q That was in 1994?	09:53:06
14	recently, and by that I mean the late 1990s?	09:49:28	14	A Yes.	09:53:07
15	MR. PEPE: Objection, form.	09:49:29	15	Q It wasn't closer to five or	09:53:09
16	A I would -- I would say they're --	09:49:29	16	600 million?	09:53:11
17	they're reasonably receptive today to patent	09:49:34	17	A In '94? You may be right. I	09:53:21
18	pools that are appropriately organized. I	09:49:37	18	thought we had passed the billion dollar mark	09:53:24
19	would say that they were not receptive to	09:49:41	19	during my career. I may be wrong. I	09:53:24
20	patent pools in the first half of the 20th	09:49:44	20	thought -- I thought we had.	09:53:25
21	Century, but when that attitude changed or	09:49:48	21	Q In any event, was that more than	09:53:27
22	whether that attitude changed and to what	09:49:51	22	any other company at the time?	09:53:29
23	extent, I'm not in a position to say.	09:49:54	23	A We were the number one in royalty	09:53:36
24	Q Do you think that attitude changed	09:49:56	24	income, intellectual property compensation	09:53:40
25	after you left IBM in 1994?		25	income.	
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1	A As I say, I'm really not in a	09:50:05	1	Q And does IBM still hold that	09:53:43
2	position to judge that.	09:50:11	2	position to your knowledge?	09:53:45
3	Q Can you identify, and I apologize	09:50:13	3	A To my knowledge it still does,	09:53:46
4	if you answered this already, but were there	09:50:14	4	though I'm getting further and further apart	09:53:49
5	any other cases prior to 2004, 2005 in which	09:50:19	5	from actual knowledge of what goes on.	09:53:53
6	you analyzed patent pools?	09:50:22	6	Q Do you have a sense of today how	09:53:55
7	A I think you did ask and I think I	09:50:25	7	much IBM's IP annual royalties are?	09:54:01
8	answered that I can't recall any.	09:50:59	8	A I -- I don't. I would -- I would	09:54:02
9	Q Can you tell me what your	09:51:02	9	suspect that they're in the neighborhood of	09:54:12
10	involvement in drafting licensing agreements	09:51:05	10	several billion dollars, more than a billion	09:54:14
11	was while you were at IBM?	09:51:08	11	dollars.	09:54:24
12	A Well, I -- I commenced my career	09:51:14	12	Q How large in terms numerically was	09:54:24
13	as a licensing lawyer in probably 1970, and in	09:51:22	13	IBM's portfolio of patents when you left in	09:54:24
14	those days I drafted agreements. When I became	09:51:27	14	'94?	09:54:27
15	assistant general counsel I did some drafting	09:51:34	15	A The portfolio of active patents	09:54:31
16	of agreements, but in general I supervised	09:51:38	16	when I left was in excess of 30 to 35,000 I	09:54:38
17	others and/or I actually supervised those who	09:51:43	17	guess.	09:54:41
18	supervised others and I participated in	09:51:47	18	Q Is that worldwide patents or just	09:54:44
19	negotiating some of the more important	09:51:50	19	U.S.?	09:54:45
20	agreements that IBM had with its competitors.	09:51:55	20	A Worldwide.	09:54:46
21	Q Okay, but the time period that	09:51:58	21	Q Do you know how many U.S. patent?	09:54:49
22	you're referring to for right now when you were	09:52:02	22	A Probably ten to 12,000.	09:54:53
23	negotiating some of the more important IBM	09:52:06	23	Q Can you describe any general areas	09:54:57
24	licensing agreements, is that the 1982 to 1994	09:52:11	24	covered by these patents?	09:55:00
25	period when you were assistant counsel?		25	A You name them and we had them.	
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1	They range from patents relating to	09:55:06	1	cha-cha-cha, 1-2, 1-2-3.	09:58:22
2	semiconductor devices to patents relating to	09:55:10	2	We had a group of patents that we	09:58:26
3	computer architecture, patents relating to	09:55:18	3	considered to be our most valuable patents, and	09:58:30
4	various fairly esoteric researched devices. We	09:55:25	4	at the time this program was announced I think	09:58:32
5	have the honor of having at least three noble	09:55:28	5	there were like three or four patents in the	09:58:35
6	prize winners among our employees.	09:55:36	6	group. And those patents we licensed at	09:58:35
7	Q So you licensed -- IBM licensed	09:55:39	7	1 percent for one, 2 percent for two, 2 percent	09:58:41
8	its patents to companies who manufactured	09:55:43	8	for as many of them as you wanted. Of course	09:58:44
9	semiconductors?	09:55:45	9	there were only about four at the time.	09:58:51
10	A We did, yes.	09:55:48	10	And the rest of our portfolio was	09:58:54
11	Q And what royalty rate did IBM	09:55:52	11	the cha cha cha part. And you can have one	09:58:55
12	charge?	09:55:54	12	patent for 1 percent, two patents for 2	09:58:57
13	A We have, or had during my tenure,	09:55:56	13	percent, three patents or more for 3 percent.	09:58:57
14	a licensing practice in accordance with which	09:56:02	14	So if you, if you needed patents from category	09:59:04
15	we charged a royalty of 1 percent per patent to	09:56:07	15	one, you paid 1 or 2 percent, depending on	09:59:06
16	a maximum of 5 percent for the entire	09:56:12	16	whether you used one or two patents. And if	09:59:10
17	portfolio.	09:56:17	17	you used patents from category B or category 2,	09:59:14
18	Q Was there any program by which a	09:56:20	18	you paid an additional 3 percent.	09:59:19
19	licensee could obtain rights to all of IBM's	09:56:25	19	We -- we abandoned that program, I	09:59:22
20	patents for less than 5 percent?	09:56:28	20	think probably in the early '90s in favor of a	09:59:26
21	MR. PEPE: Objection, form.	09:56:29	21	simple one, one, one category where if you used	09:59:31
22	You can answer.	09:56:32	22	one patent you paid 1 percent until a maximum	09:59:34
23	A Certainly in a cross license the	09:56:35	23	of five.	09:59:36
24	compensation would have been in a form other	09:56:40	24	Q Okay. So during this time period	09:59:37
25	than pay-as-you-go royalties.		25	between 1987 and the early '90s it was possible	
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1	Q Let me -- let me be more specific.	09:56:47	1	for a licensee to acquire all of IBM's patents	09:59:47
2	I thought I had seen some reference to IBM	09:56:52	2	other than the three or four most valuable for	09:59:50
3	having two separate patent program. In one	09:56:57	3	a total cost of 3 percent?	09:59:53
4	patent program licensees could obtain IBM's,	09:57:02	4	A Yes, it was.	09:59:57
5	some portions of IBM's patents were 3 percent	09:57:06	5	Q Prior to 1987, what would a	10:00:01
6	and some other portion of IBM's patents were	09:57:08	6	licensee have to pay in terms of a percentage	10:00:04
7	2 percent?	09:57:09	7	royalty rate to acquire rights to IBM's entire	10:00:10
8	A Yes, there was a -- when we -- we	09:57:13	8	patent portfolio?	10:00:12
9	overhauled our licensing program in 1987, I	09:57:18	9	A I think prior to 1987, one could	10:00:16
10	think it was. Prior to that time we had -- we	09:57:22	10	acquire rights to our entire portfolio for 6/10	10:00:21
11	had a licensing practice which was -- was	09:57:25	11	of 1 percent of the selling price of a	10:00:23
12	really majoring on freedom of action and not --	09:57:31	12	computer.	10:00:31
13	not royalty income.	09:57:33	13	Q And so since the 1990s when this	10:00:34
14	The world changed in the '80s when	09:57:35	14	cha cha program was abandoned, IBM has licensed	10:00:42
15	the personal computer came into being and	09:57:39	15	each and every one of its patents at the same	10:00:48
16	people could manufacture these devices in their	09:57:41	16	per patent rate?	10:00:53
17	garages without doing any R and D and so they	09:57:46	17	MR. PEPE: Objection, form.	10:00:53
18	could, they could charge very low prices that	09:57:49	18	Go ahead.	10:00:54
19	didn't reflect any R and D expense. And we	09:57:53	19	A During my career, that's -- that's	10:00:55
20	decided at that point that we needed to have a	09:57:56	20	correct.	10:01:01
21	more reasonable, commercially reasonable	09:57:59	21	Q And that was 1 percent for any	10:01:04
22	licensing program. And so I cochaired a task	09:58:04	22	single owned patent by IBM?	10:01:08
23	force to create a new licensing practice. And	09:58:09	23	A Yes.	10:01:30
24	the first iteration of that is what you refer	09:58:11	24	Q Do you recall the name of any of	10:01:32
25	to, what we called the cha cha program, cha-cha		25	the semiconductor manufacturers who were	
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1	licensees?	10:01:37	1	or a CD drive?	10:04:53
2	A Oh, my. Intel, Texas Instruments,	10:01:50	2	A I think if your and my definitions	10:04:55
3	the old days Fairchild Semiconductor, Cyrix.	10:01:55	3	of optical disc drives are the same, I think a	10:04:56
4	Those are the names that come to mind. I know	10:02:02	4	DVD would be an optical disc drive because I	10:04:59
5	there were many more.	10:02:13	5	believe it uses optics to read the pits in a	10:05:05
6	Motorola may have been one of	10:02:15	6	disc.	10:05:06
7	them.	10:02:16	7	MR. PEPE: We've at just over an	10:05:08
8	Q How much were these semiconductor	10:02:19	8	hour. Is it an appropriate time to	10:05:10
9	products, for example those manufactured by	10:02:21	9	take a break?	10:05:14
10	Intel, selling for by the time you left IBM?	10:02:26	10	MR. WION: Yeah, let's take a five	10:05:16
11	A I have no recollection.	10:02:32	11	minute break.	10:05:17
12	Q Was the -- was IBM's percentage or	10:02:34	12	VIDEOGRAPHER: We are going off	10:05:18
13	royalty rate applied to the sale price of the	10:02:39	13	the record. The time is 10:05.	
14	semiconductor product?	10:02:42	14	(Whereupon, at 10:05 a.m., a recess	
15	A It was applied to the selling	10:02:44	15	was taken to 10:18 a.m.)	
16	price of the apparatus that had a legitimate	10:02:49	16	(The deposition resumed with all	
17	element user selling price.	10:02:54	17	parties present.)	10:18:13
18	Q Okay. What type of apparatus are	10:02:58	18	VIDEOGRAPHER: We are now back on	10:18:14
19	you referring to?	10:03:03	19	the record. The time is 10:18.	
20	A Well, if -- if, for example, a	10:03:06	20	BY MR. WION:	10:18:18
21	company sold a laptop computer, it would be the	10:03:09	21	Q Mr. Smith, in your view what is	10:18:21
22	price of that laptop computer, the retail	10:03:12	22	the relationship between a RAND rate and a	10:18:24
23	price. If a company sold a motherboard on the	10:03:15	23	commercially reasonable rate?	10:18:27
24	market, it would be the price of the	10:03:17	24	A Well, I think you need to define	10:18:29
25	motherboard and so on. But it had to be a		25	RAND rate. I think a commercially reasonable	
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1	legitimate price that was offered for sale at	10:03:26	1	rate is a RAND rate.	10:18:36
2	the arms length transactions.	10:03:32	2	Q Are they synonymous?	10:18:39
3	Q So these motherboards would be	10:03:34	3	A I think the term RAND is -- the	10:18:42
4	used by a third party computer manufacturer; is	10:03:40	4	term RAND encompasses I think a range of rates	10:18:49
5	that right?	10:03:40	5	that are commercially reasonable and I think	10:18:53
6	A Yes, yeah, or -- yes, correct.	10:03:44	6	that -- I don't know that I would say the terms	10:18:57
7	Q So if a motherboard costs a	10:03:48	7	are synonymous, but certainly commercially	10:19:01
8	hundred dollars, IBM was charging its	10:03:51	8	reasonable rates are within RAND rates.	10:19:13
9	percentage royalty rate based on that hundred	10:03:55	9	Q So a commercially reasonable rate	10:19:17
10	dollar sale price of a motherboard?	10:03:58	10	will always be a RAND rate?	10:19:20
11	A Yes, for the patents that were	10:03:59	11	A I believe to the extent that we're	10:19:22
12	contained within the motherboard.	10:04:06	12	talking about the same thing when we say	10:19:25
13	Q Do you know what an optical disk	10:04:09	13	commercially reasonably, I think that is	10:19:26
14	drive is?	10:04:11	14	correct, yes.	10:19:27
15	A Optical disc drive, in general I	10:04:14	15	Q As you define commercially	10:19:28
16	do, yes.	10:04:17	16	reasonable?	10:19:30
17	Q Did IBM have patents covering	10:04:21	17	A I define it in my -- in my report	10:19:32
18	optical disc drives?	10:04:23	18	as a rate which profits a non-trivial return	10:19:38
19	A I believe we did. Yes.	10:04:28	19	for the research development and -- and	10:19:41
20	Q And did IBM license manufacturers	10:04:37	20	creative effort that will provide a reasonable	10:19:47
21	of optical disc drives?	10:04:39	21	but -- but not excessive return for the --	10:19:51
22	A I believe we did, but as I sit	10:04:40	22	for -- for those efforts.	10:19:58
23	here I can't identify specifics.	10:04:46	23	Q How do you determine whether a	10:20:01
24	Q An you give an example of a	10:04:49	24	return is excessive?	10:20:02
25	optical disc drive? Is that like a DVD drive		25	A I think that is really determined	
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1	during a bilateral negotiation between the	10:20:08	1	investment as including investment in three	10:23:25
2	parties.	10:20:09	2	things, time, money and resources?	10:23:29
3	Q And absent a bilateral negotiation	10:20:12	3	A Um-hmm.	10:23:33
4	between the parties, is there any way you can	10:20:15	4	Q Can time and resources of a	10:23:36
5	determine whether the rates are excessive?	10:20:20	5	company like IBM or Motorola be reduced to a	10:23:41
6	A I think that that would be hard to	10:20:22	6	quantifiable dollar amount?	10:23:48
7	do in the abstract. I think one needs to look	10:20:30	7	A I suppose an accountant could do	10:23:51
8	at the industry and what the -- what the normal	10:20:36	8	that, but I can't.	10:23:55
9	bilateral licensing arrangements in the	10:20:39	9	Q So time, money and resources can	10:23:58
10	industry are, the normal rates.	10:20:41	10	effectively be collapsed to an investment in	10:24:02
11	Q Is it your view that the result of	10:20:45	11	money?	10:24:05
12	a bilateral negotiation will always result in a	10:20:50	12	MR. PEPE: Objection, form.	10:24:06
13	commercially reasonable licensing rate?	10:20:58	13	A No, I don't think you -- I don't	10:24:09
14	A I believe that -- that	10:21:01	14	think you can relate it to an investment in	10:24:11
15	negotiations between sophisticated licensing	10:21:07	15	money. I think you need to consider creativity	10:24:18
16	partners will -- will achieve a commercially	10:21:12	16	and just the entire activity that research and	10:24:28
17	reasonable rate, yes.	10:21:23	17	development folks participate in.	10:24:34
18	Q If you refer to your definition of	10:21:24	18	I'm not an economist so maybe I	10:24:37
19	commercially reasonable as including a -- as	10:21:29	19	can't answer the question that you're asking.	10:24:40
20	requiring that the rate result in a nontrivial	10:21:35	20	Q How do you quantify a return on	10:24:45
21	return for the patent holder, and this is at	10:21:42	21	time and resources to determine whether it's	10:24:51
22	page 7, footnote 1.	10:21:50	22	trivial or not?	10:24:53
23	You write, I quote, commercially	10:21:52	23	A Well, a return of zero is trivial	10:24:56
24	reasonable value unquote, or quote,	10:21:53	24	in my view. A return of a peppercorn is	10:24:59
25	Commercially reasonable rate, unquote, as used		25	trivial in my view. A return of 5 percent, 1	
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1	in the context of this report, I mean a value	10:22:01	1	to 5 percent of -- of the sales price of the	10:25:11
2	or rate that account non-trivially for the	10:22:04	2	goods that the patents are employed in is	10:25:16
3	significant investment of time, money and	10:22:07	3	nontrivial.	10:25:26
4	resources expended and invested in developing	10:22:10	4	Q Well, on one side of the equation	10:25:29
5	the technology and obtain the patents at issue.	10:22:14	5	the patent holder is attempting to get money.	10:25:32
6	And that's your definition of	10:22:17	6	It's trying to get value for a rate of return,	10:25:36
7	commercially reasonable?	10:22:18	7	correct?	10:25:37
8	A Yes.	10:22:19	8	A Yes.	10:25:37
9	Q So what did you mean when you used	10:22:21	9	Q On the other side of the equation	10:25:39
10	the word or term non-trivially -- trivially?	10:22:24	10	you've listed time, money and resources, that	10:25:44
11	A Well, I mean -- I mean that it --	10:22:28	11	has to be quantified in some manner, correct?	10:25:50
12	it -- it returns a -- a -- a fair and	10:22:38	12	A Yes, um-hmm.	10:25:52
13	reasonable rate, not a -- not a trivial rate.	10:22:41	13	Q How do you quantify time, money	10:25:54
14	You know, I don't know how you define	10:22:45	14	and resources to determine whether the rate is	10:25:57
15	nontrivial other than to say it's not trivial.	10:22:50	15	trivial or not?	10:25:59
16	Q Doesn't that become somewhat	10:22:52	16	A I don't think you need to quantify	10:26:03
17	circular if you're defining commercially	10:22:55	17	those items to determine whether the return is	10:26:08
18	reasonable as a fair and reasonable rate?	10:23:03	18	trivial. As I say, I think -- I think those of	10:26:14
19	A I'm not sure I understand your	10:23:05	19	us in the licensing profession and in the	10:26:16
20	statement.	10:23:06	20	research and development profession will	10:26:20
21	Q Okay. So you're indicating that a	10:23:09	21	recognize what a trivial return is and what a	10:26:25
22	commercially reasonable rate will -- means a	10:23:13	22	nontrivial return is.	10:26:27
23	nontrivial return on an investment.	10:23:18	23	Q But you agree that you have to	10:26:29
24	A Um-hmm.	10:23:19	24	know what it is that you're getting a return	10:26:32
25	Q Okay. And you refer to the		25	on, correct?	
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1	A In general, yes.	10:26:37	1	be kind of horse pack and I don't think would	10:29:27
2	Q And a return is some type of	10:26:40	2	be useful.	10:29:36
3	multiplier?	10:26:43	3	Q How do you know whether the rates	10:29:37
4	A A return --	10:26:44	4	that Motorola has charged for its standard	10:29:41
5	MR. PEPE: Objection, form.	10:26:46	5	essential patents are commercially reasonable?	10:29:45
6	A I don't know, I'm not sure I	10:26:47	6	MR. PEPE: Objection, form.	10:29:46
7	understand what you mean as some type of	10:26:50	7	A I have not -- I have been asked to	10:29:49
8	multiplier.	10:26:56	8	determine whether or not those rates are	10:29:51
9	Q If a patent holder expends \$10	10:26:59	9	commercially reasonable.	10:29:53
10	million to develop a standard essential patent,	10:27:02	10	Q You have no view on that subject?	10:29:58
11	what is a rate of return that provides a	10:27:05	11	A I have -- I have no specific view	10:30:01
12	nontrivial return for that investment?	10:27:08	12	that was -- that was requested of me and have	10:30:07
13	MR. PEPE: Objection, form.	10:27:09	13	no opinion that was requested of me in that	10:30:10
14	A I think you need to look at a	10:27:12	14	area.	10:30:14
15	number of things to understand that, some of	10:27:15	15	Q You say also in footnote 1 that,	10:30:16
16	which would include the market for the patent,	10:27:21	16	"A commercially reasonable rate provides a	10:30:19
17	the number of -- the members of the industry	10:27:24	17	meaningful return on these investments." Can	10:30:22
18	that -- that would be interested in having a	10:27:28	18	you describe what you mean by a meaningful	10:30:25
19	license under the patent. I just don't think	10:27:31	19	return?	10:30:27
20	you can reduce this to dollar and cents in the	10:27:36	20	A Well, I think a meaningful return	10:30:30
21	fashion that you're trying to or that your	10:27:39	21	is a nontrivial return. It is, as I say a	10:30:35
22	questions seem to be trying to.	10:27:40	22	return of zero, or a peppercorn is -- is not a	10:30:38
23	Q So in fact in order to determine a	10:27:43	23	meaningful return.	10:30:46
24	commercially reasonable value you need to know	10:27:45	24	MR. WION: Let's take a break so	10:30:48
25	more than what you have defined as commercially		25	the tape can get switched.	
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1	reasonable?	10:27:51	1	VIDEOGRAPHER: This marks the end	10:30:51
2	A I don't know that I understand the	10:27:51	2	of tape one. We are going off the	10:30:54
3	question.	10:28:12	3	record. The time is 10:30.	
4	Q Have you seen any evidence or	10:28:14	4	(Whereupon, at 10:30 a.m., a recess	
5	analysis quantifying Motorola's investment in	10:28:14	5	was taken to 10:35 a.m.)	
6	either its H.264 or 802.11 portfolios?	10:28:21	6	(The deposition resumed with all	
7	MR. PEPE: Objection, form.	10:28:22	7	parties present.)	10:35:51
8	Outside the scope of his expert report.	10:28:27	8	VIDEOGRAPHER: Here marks the	10:35:52
9	A I don't believe I have.	10:28:31	9	beginning of tape number two. We are	10:35:54
10	Q Would you need to know that to	10:28:33	10	back on the record the time is 10:35.	10:35:58
11	determine what a commercially reasonable return	10:28:37	11	Q Mr. Smith, do you know the average	10:36:00
12	would be for Motorola's patents?	10:28:41	12	rate of return IBM obtained on its patents?	10:36:13
13	A I have not been asked to	10:28:42	13	A I need more information with	10:36:16
14	investigate whether, what -- what a	10:28:44	14	respect to the question. The average rate of	10:36:18
15	commercially reasonable return for Motorola's	10:28:47	15	return with respect to what its R&D.	10:36:22
16	patents would be. My -- my commission, if you	10:28:51	16	Q So with respect to the patents	10:36:23
17	will, was to examine the relationship of pools	10:28:56	17	that IBM licensed with respect to the costs	10:36:28
18	to bilateral negotiations.	10:28:59	18	that IBM sunk into developing the technology	10:36:33
19	Q I understand, but in order to	10:29:00	19	associated with those patents?	10:36:38
20	determine a commercially reasonable return from	10:29:03	20	A No. I don't believe I can give an	10:36:42
21	Motorola, you would need to know the amount of	10:29:06	21	answer to that specific question.	10:37:12
22	time, money and resources expended, correct?	10:29:12	22	Q Does a RAND royalty rate in your	10:37:18
23	A I don't know that you would, but	10:29:15	23	view have an upper bound?	10:37:23
24	as I say, I'm not -- I haven't examined that	10:29:20	24	A The RAND rate as I've said it I	10:37:26
25	and so whatever I would say at this point would		25	think encompasses a range of rates and those	
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1	would be commercially reasonable rates. I	10:37:38	1	A I think I'm going to have to ask	10:40:45
2	think something which is beyond industry norms	10:37:43	2	you to restate the question I didn't quite get	10:40:49
3	probably would not be a RAND rate, but I think	10:37:47	3	it all.	10:40:51
4	again it would depend on the particular	10:37:49	4	Q Well don't you have to look at	10:40:53
5	situation.	10:37:51	5	more specifically what type of technology is	10:40:57
6	Q What industry norms do you refer	10:37:52	6	being licensed and then would you look around	10:41:02
7	to to make that assessment?	10:37:55	7	in the industry to attempt to find agreements	10:41:06
8	A I'm looking at or thinking about	10:37:56	8	that relate to the same type of technology?	10:41:10
9	the industry norms in the data handling	10:38:03	9	A That certainly would be a fair	10:41:13
10	industry, the industries that Microsoft and	10:38:07	10	thing to do, but I would look at bilateral	10:41:17
11	Motorola participate in.	10:38:13	11	negotiations.	10:41:19
12	Q Well, when you were defining	10:38:20	12	Q And it's your view that patent	10:41:34
13	commercially reasonable it seemed to relate to	10:38:24	13	pool rates are entirely irrelevant for	10:41:37
14	what was commercially reasonable for the patent	10:38:27	14	determining what's commercially reasonable?	10:41:40
15	holder, do you have a different assessment of	10:38:32	15	A I think in general they have very	10:41:42
16	what would be commercially reasonable from the	10:38:34	16	little relevance because they proceed from a	10:41:46
17	perspective of the licensee?	10:38:37	17	different set of motivations.	10:41:49
18	A No, I don't think there is, I	10:38:43	18	Q In this specific case, is it your	10:41:51
19	don't think there are different commercially	10:38:45	19	view that the patent pools associated with the	10:41:53
20	reasonable rates based on the lens that you're	10:38:52	20	H 264 and 80211 standards are entirely	10:41:59
21	looking through. I think a commercially	10:38:54	21	irrelevant to what a commercially reasonable	10:42:04
22	reasonable rate is one that both the licensor	10:38:58	22	rate would be for Motorola's patents?	10:42:10
23	and the licensee can accept.	10:39:11	23	MR. PEPE: Objection form. Can I	10:42:10
24	Q So, if the rate is commercially	10:39:18	24	just have it read back, please.	
25	reasonable for the patent holder, your view is		25	(The requested portion of the	
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1	that it will also be commercially reasonable	10:39:25	1	record was read back.)	10:42:41
2	for a licensee?	10:39:27	2	MR. PEPE: You said entirely	10:42:43
3	MR. PEPE: Objection to form.	10:39:30	3	irrelevant.	10:42:45
4	A If one looks at a license	10:39:33	4	MR. WION: That is what I had	10:42:45
5	negotiation a bilateral negotiation that	10:39:36	5	intended.	10:42:46
6	concludes with a rate, I think that's a rate	10:39:41	6	A Well, as I say in my report I	10:42:48
7	that has satisfied both the licensor and the	10:39:46	7	think there is very little if any relevance to	10:42:52
8	licensee and to that extent it would be	10:39:49	8	a commercially reasonable rate with respect to	10:42:53
9	commercially reasonable for both.	10:39:51	9	those particular pool rates.	10:42:58
10	Q So before you can know what a	10:39:54	10	Q And I want to know if there's	10:43:01
11	commercially reasonable rate is, you have to	10:39:56	11	little relevance or no relevance at all in your	10:43:06
12	have the bilateral negotiation in your view?	10:40:00	12	view?	10:43:07
13	MR. PEPE: Objection form.	10:40:01	13	A I quite frankly I don't see any	10:43:11
14	A No, I think you can determine the	10:40:04	14	substantial relevance. I don't know that one	10:43:14
15	range of commercially reasonable rates by	10:40:07	15	can make an absolute statement that something	10:43:18
16	looking at licensing practices in that	10:40:11	16	is totally off the table, but I don't think one	10:43:22
17	industry.	10:40:24	17	would look at those rates seriously in	10:43:27
18	Q Are licensing practices -- I'm	10:40:27	18	determining what a commercially reasonable rate	10:43:30
19	sorry.	10:40:28	19	would be in a bilateral negotiation for the	10:43:33
20	Are licensing practices in the	10:40:30	20	patents that are involved in this case.	10:43:36
21	data handling industry uniformly going to be	10:40:34	21	Q So you are not expressing the	10:43:38
22	relevant to a determination of what's	10:40:38	22	opinion that the H 264 and 80211 patent pools	10:43:45
23	commercially reasonable for the license of	10:40:40	23	are entirely irrelevant for this purpose?	10:43:48
24	Motorola's patents?	10:40:42	24	A I think as I have said I see	10:43:51
25	MR. PEPE: Objection form.		25	little or no relevance but I dislike being	
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1	characterized as saying one wouldn't even look	10:44:04	1	the patents and does he, does he require the	10:47:24
2	at them. I don't think one would look	10:44:07	2	patents.	10:47:29
3	seriously at them.	10:44:08	3	Q Okay, so in that factor you're not	10:47:32
4	Q So they may be relevant but in	10:44:11	4	suggesting that there's some comparison between	10:47:35
5	your view the relevance is suspect, is that	10:44:13	5	the importance of a given patent against a	10:47:39
6	fair?	10:44:14	6	separate patent, it's just whether the licensee	10:47:43
7	A The relevance is little to none.	10:44:17	7	is using the patent?	10:47:46
8	Q Well, again, I think we're having	10:44:19	8	A That is certainly true. The, the	10:48:01
9	the same problem, is it none or is there some	10:44:24	9	importance of the patent could be, could affect	10:48:10
10	relevance?	10:44:27	10	the negotiation if for example it was a trivial	10:48:13
11	MR. PEPE: Objection to the extent	10:44:28	11	patent then that would effect the arrangement,	10:48:17
12	it's mischaracterizing what he is	10:44:29	12	if it's a critical patent that would effect the	10:48:21
13	saying. He's saying little to none	10:44:31	13	arrangement.	10:48:23
14	he's not saying none.	10:44:34	14	Q And if it's a standard essential	10:48:26
15	Q You are excluding none?	10:44:37	15	patent that also affects the analysis?	10:48:31
16	A I am saying there is little	10:44:39	16	A I think so, yes.	10:48:33
17	substantial relevance to the issue. Whether --	10:44:46	17	Q In what way?	10:48:35
18	if by no relevance you mean one couldn't one	10:44:51	18	A That would be a patent that would	10:48:36
19	wouldn't even consider or look at them or put	10:44:54	19	be important to the activity.	10:48:43
20	them in the picture at all I'm not sure I would	10:44:56	20	Q And when you refer to the	10:48:44
21	say that, but I would say having looked at them	10:44:59	21	profitability of the activity, you are	10:48:46
22	I think they have little to no relevance.	10:45:10	22	referring to the actual profits made by the	10:48:49
23	Q So in paragraph 20 of your report	10:45:13	23	licensee?	10:48:52
24	on page seven you discuss the form or amount of	10:45:21	24	A In general, yes. It is the	10:48:57
25	payment, let me make sure I see it, so at the		25	licensees' profits are incorporated there.	
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1	bottom of the page on page seven you write the	10:45:28	1	Q So are you saying that the	10:49:04
2	precise form and amount of the compensation to	10:45:33	2	licensees' profit margins are relevant to the	10:49:07
3	be transferred results from good faith	10:45:35	3	rate that that licensee should pay?	10:49:14
4	bilateral negotiations between parties taking	10:45:40	4	A I think the licensees'	10:49:15
5	into account factors. And then you list a few	10:45:43	5	profitability is a consideration, yes.	10:49:23
6	factors including the importance of the	10:45:46	6	Q And so that the rate could	10:49:25
7	patent's rights to the activity and to the	10:45:48	7	fluctuate depending on how profitable the	10:49:29
8	licensee, the profitability of the activity,	10:45:51	8	licensee is in that activity?	10:49:32
9	the extent of exposure of the licensee, the	10:45:55	9	A Within the bounds of reasonable	10:49:35
10	typical royalties extent in the relevant	10:45:59	10	and nondiscriminatory rates, yes.	10:49:38
11	industry, the ability of the licensee to	10:46:01	11	Q If you have two potential	10:49:40
12	compete in the marketplace without having the	10:46:04	12	licensees, all else being equal, but those two	10:49:43
13	patented technology and so on. My first	10:46:09	13	licensees have different profit margins, you	10:49:47
14	question is: Would you add anything to that	10:46:12	14	can't charge different rates, correct?	10:49:50
15	list where you write and so on?	10:46:36	15	MR. PEPE: Objection form.	10:49:52
16	A Well, as I sit here at the moment	10:46:38	16	A Well, I think now you need to look	10:49:54
17	I can't identify specific additional things. I	10:46:41	17	at the commitment that has been made if we're	10:49:57
18	think when I mentioned the profitability of the	10:46:44	18	talking about standard essential patents. I	10:50:00
19	activity that wouldn't include the licensees'	10:46:50	19	think the RAND commitment requires that there	10:50:02
20	profitability and his ability to pay and	10:46:54	20	be no discrimination among licensees and so you	10:50:06
21	continue to make a profit.	10:46:59	21	would need to look to see whether different	10:50:09
22	Q So the first item here is the	10:47:02	22	rates would in fact create discrimination. But	10:50:11
23	importance of the patent rights to the activity	10:47:04	23	again I think you need to look into individual	10:50:17
24	and to the licensee, what did you mean by that?	10:47:17	24	situations.	10:50:18
25	A Well, I mean is the licensee using		25	Q I'm not sure I have an answer to	
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1	that question. If you have two licensees who	10:50:25	1	lower?	10:53:33
2	are in a similar situation but have different	10:50:30	2	MR. PEPE: Objection form.	10:53:34
3	profit margins, is that relevant to the rate to	10:50:33	3	A I think that would effect such	10:53:37
4	be charged?	10:50:35	4	things for example as the scope of the license,	10:53:42
5	MR. PEPE: Objection to form	10:50:36	5	the extent of exposure may go beyond the	10:53:46
6	incomplete hypothetical.	10:50:47	6	standard for example if you're talking about a	10:53:48
7	A I'm not sure quite how to answer	10:50:49	7	standard related situation.	10:53:54
8	that question other than to say that if you	10:50:51	8	Q Maybe it would be helpful if you	10:53:56
9	have established a rate for that patent in a	10:50:56	9	could clarify what you mean by exposure when	10:54:00
10	bilateral arms length negotiation with a	10:51:01	10	you write it here?	10:54:02
11	licensee that rate should be applicable to	10:51:06	11	A Well, I mean to the extent to	10:54:04
12	others. Typically license agreements have most	10:51:09	12	which the licensee needs the patent. Now he	10:54:09
13	avored licensee provisions which would require	10:51:13	13	may need it for a limited area he made need it	10:54:15
14	you to offer the same rate, although in given	10:51:18	14	for a broad area, and I think his exposure	10:54:17
15	licensing situations there are other things	10:51:20	15	differs in those two circumstances.	10:54:19
16	that come into play such as cross licenses,	10:51:25	16	Q Does a licensees' exposure also	10:54:22
17	grant backs, scope of the grant and so on which	10:51:32	17	change depending at what point in time you're	10:54:25
18	might affect it.	10:51:38	18	analyzing that exposure?	10:54:32
19	Q Do you know whether Motorola's	10:51:40	19	A I don't know that it does, no, I	10:54:33
20	licensing includes most favored nation clauses?	10:51:45	20	suppose it could -- you know circumstances vary	10:54:38
21	MR. PEPE: Objection form outside	10:51:47	21	from case to case but if you're thinking of	10:54:44
22	the scope of his expert report.	10:51:49	22	past liability that would, that would be	10:54:49
23	A I have not examined to determined	10:51:52	23	involved but I don't know that that would	10:54:50
24	them to do that.	10:51:58	24	effect the rate, it might affect the overall	10:54:55
25	Q You say the extent of exposure of		25	payment.	
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1	the licensee is relevant, can you explain why?	10:52:05	1	Q Well, if I want to implement a	10:54:59
2	A Well, when you're looking at a	10:52:08	2	standard and include that technology in my	10:55:04
3	license negotiation a bilateral license	10:52:13	3	product, would you agree that my exposure is	10:55:09
4	negotiation, you're looking at a specific set	10:52:15	4	less before I sink money and time, R&D into	10:55:16
5	of circumstances, you are looking at ways that	10:52:16	5	that technology as opposed to when my product	10:55:19
6	the two parties come together to form a license	10:52:21	6	is already on the market?	10:55:21
7	that is meaningful for both, it may be a	10:52:23	7	MR. PEPE: Steve objection form.	10:55:23
8	royalty to bearing license, the conversation	10:52:26	8	A I think you need to look at	10:55:27
9	may be in the form of none royalties and so	10:52:33	9	whether and to what extent you intend to be	10:55:31
10	factors such as the extent of the exposure of	10:52:35	10	involved in that technology. If you're	10:55:33
11	the licensee may have an impact on, for example	10:52:40	11	dabbling and you're saying that, yeah, I might	10:55:37
12	if you are arranging for a balancing payment or	10:52:43	12	make a widget if I can get a license for a	10:55:40
13	a one time payment they could be -- they could	10:52:47	13	peanut but I'm not going to make that widget	10:55:46
14	effect that.	10:52:52	14	dollar then your exposure is different, but if	10:55:47
15	Q So would you say that greater	10:52:55	15	you are a serious player in the technology and	10:55:50
16	exposure warrants an increase in the royalty	10:52:59	16	the patent is the key to the technology I think	10:55:54
17	rate?	10:53:04	17	your exposure exists.	10:55:56
18	A It might affect the overall	10:53:07	18	Q Well, let's put it this way: Is a	10:56:00
19	compensation that passes between the parties I	10:53:09	19	potential licensees' exposure greater after	10:56:06
20	don't know that royalty rate would necessarily	10:53:12	20	infringement as opposed to before it has done	10:56:12
21	be the thing that would be affected.	10:53:15	21	any activity that infringes the patent holder's	10:56:17
22	Q Well, if the licensee has greater	10:53:18	22	patents?	10:56:18
23	exposure then would you anticipate that the	10:53:22	23	MR. PEPE: Objection form.	10:56:20
24	terms are ultimately going to be more favorable	10:53:26	24	A Well, to the extent that a	10:56:22
25	to the patent holder than if the exposure was		25	licensee has not infringed the patent or has	
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1	not used the patent he has no exposure.	10:56:29	1	believe about the, the license that the pool	11:00:41
2	Q And is that going to affect the	10:56:31	2	offers to a licensee as opposed to a	11:00:44
3	bilateral negotiations?	10:56:34	3	bilaterally negotiated license, and it's quite	11:00:48
4	MR. PEPE: Objection form.	10:56:36	4	clear I think that when a pool license has been	11:00:52
5	A I don't know that it would affect	10:56:37	5	established it becomes nonnegotiable and so the	11:00:57
6	it in terms of determining a RAND arrangement.	10:56:43	6	transaction cost namely the cost of negotiating	11:01:00
7	I think the question is whether the licensee	10:56:49	7	that license with a licensee is very small	11:01:03
8	wants to be involved in that technology or not.	10:57:02	8	compared to the transaction cost of a bilateral	11:01:07
9	Q Lastly you write that another	10:57:03	9	negotiation.	11:01:09
10	factor that you would take into account	10:57:08	10	Q In this particular case as between	11:01:12
11	regarding the form and amount of compensation	10:57:13	11	Microsoft and Motorola, what specifically are	11:01:16
12	to be transferred is the ability of the	10:57:14	12	the transaction costs involved?	11:01:21
13	licensee to compete in the marketplace without	10:57:17	13	A Well I think that's beyond the	11:01:22
14	having the patented technology. Does the	10:57:22	14	scope of the activity that I have been asked to	11:01:26
15	licensees ability to compete in the marketplace	10:57:25	15	evaluate.	11:01:28
16	without the patented technology change over	10:57:29	16	Q Well, you've evaluated differences	11:01:32
17	time in your view?	10:57:39	17	between bilateral negotiations and patent	11:01:35
18	A I suppose it could I think again	10:57:40	18	pools?	11:01:36
19	these are situation dependent questions.	10:57:49	19	A And I can tell you in general	11:01:37
20	Q Well, when you --	10:57:54	20	about that, but I don't know that I can talk	11:01:40
21	A We're talking about a continuum of	10:57:56	21	specifically about Motorola and Microsoft	11:01:43
22	events and a lot of things effects that	10:57:59	22	negotiations because I haven't studied them.	11:01:50
23	continuum as time goes on.	10:58:01	23	Q Well, how much higher, do you	11:01:53
24	Q And so the results of negotiations	10:58:05	24	think, the commercially reasonable rate in a	11:02:00
25	will be different at point A as opposed to		25	bilateral negotiation between Microsoft and	
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1	point B if point A is prior to infringement and	10:58:14	1	Motorola would be if you adjust for transaction	11:02:08
2	B is after infringement?	10:58:17	2	costs?	11:02:10
3	MR. PEPE: Objection form.	10:58:20	3	MR. PEPE: Objection form, outside	11:02:12
4	A That certainly would be the case	10:58:21	4	the scope of his expert report,	11:02:14
5	with respect to past liability.	10:58:25	5	incomplete hypothetical.	11:02:20
6	Q But you don't think that that	10:58:27	6	A I don't -- can you restate that	11:02:22
7	would necessarily impact the royalty rate?	10:58:31	7	question or ask it again I kind of lost it.	11:02:25
8	A I think in terms of -- if we're --	10:58:35	8	Q What impact does the difference in	11:02:28
9	my report deals with reasonable and	10:58:38	9	transaction costs have on the rate negotiated	11:02:34
10	nondiscriminatory terms and conditions as they	10:58:41	10	bilaterally?	11:02:40
11	apply to standards and I don't, I don't think	10:58:48	11	A I don't think -- I think the	11:02:42
12	that a, a negotiation before the standard is	10:58:55	12	transaction costs in bilateral negotiation are	11:02:45
13	created would necessarily be different from a	10:58:59	13	much higher because these are individual	11:02:48
14	negotiation after the standard is created	10:59:02	14	negotiations that require a great deal of	11:02:52
15	within the -- within the bounds of a reasonable	10:59:05	15	effort before, during and in the formative	11:02:53
16	and nondiscriminatory rate. I think the	10:59:10	16	stages of the agreement. But I don't think	11:03:00
17	licensor is bound to that rate, bound to that	10:59:13	17	that one adjusts the the reasonable and	11:03:06
18	condition of reasonable and nondiscriminatory	10:59:17	18	nondiscriminatory rate based on the fact that	11:03:09
19	before and after.	11:00:16	19	you have had a difficult negotiation. I think	11:03:14
20	Q You note that one difference	11:00:18	20	the licensor is bound to offer that	11:03:18
21	between a pool license and a bilaterally	11:00:25	21	nondiscriminatory rate under its RAND	11:03:23
22	negotiated license is that pool licenses	11:00:27	22	commitment irrespective of how long and how	11:03:26
23	involve lower transaction costs, what did you	11:00:30	23	difficult the negotiation is.	11:03:50
24	mean by transaction costs?	11:00:33	24	Q So you note that pool rates and	11:03:53
25	A I'm talking at that point I		25	bilateral negotiated rates are often different	
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1	in that pool rates are often lower, that's your	11:04:04	1	to do?	11:07:21
2	view?	11:04:05	2	MR. PEPE: Objection form.	11:07:22
3	A Yes, I think pool rates are	11:04:07	3	A It requires him to offer, to offer	11:07:27
4	typically lower because they proceed from	11:04:09	4	licenses to reasonable applicants under	11:07:32
5	different set of incentives and motivations.	11:04:12	5	reasonable nondiscriminatory terms and	11:07:36
6	Q Do you have any way of assessing	11:04:15	6	conditions. The standards organization does	11:07:39
7	what portion of that difference is associated	11:04:18	7	not dictate -- dictate, I'm sorry, term,	11:07:47
8	with the different transaction costs under the	11:04:21	8	termination or any of those provisions.	11:07:52
9	two models?	11:04:29	9	Q Does the licensee have to	11:07:54
10	A No, I don't know that you can	11:04:32	10	acquiesce to the patent holders preferences on	11:07:59
11	identify specific impacts of the transaction	11:04:36	11	these terms?	11:08:00
12	costs I think the lower transaction costs are a	11:04:40	12	A A bilateral negotiation is a	11:08:03
13	consequence to a pool license and are a reason	11:04:52	13	bilateral negotiation and it's a negotiation in	11:08:05
14	that licensees like pool licenses.	11:04:57	14	which both parties ultimately agree on a set of	11:08:11
15	Q You also say pool license are	11:04:59	15	terms and conditions including compensation.	11:08:19
16	nonnegotiable and therefore contain terms that	11:05:06	16	Q So a patent holder subject to a	11:08:22
17	cannot be modified to accommodate a particular	11:05:06	17	RAND commitment does not have the power to	11:08:24
18	licensing scenario that's in paragraph 22, do	11:05:15	18	impose these terms for potential licensee	11:08:29
19	you see that as a draw back for the patent	11:05:20	19	unilaterally?	11:08:30
20	holder?	11:05:22	20	A To impose -- he doesn't have the	11:08:33
21	A I see that as a reason why a	11:05:30	21	power to impose unreasonable terms	11:08:37
22	patent holder may decide he wants to	11:05:34	22	unilaterally.	11:08:50
23	bilaterally license his patents as opposed to	11:05:39	23	Q And it's your opinion that	11:08:52
24	allowing the pool administrator to license them	11:05:41	24	reasonable terms are those that both parties	11:08:53
25	under terms that are nonnegotiable. In a		25	agree on?	
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1	bilateral negotiation there is always give and	11:05:51	1	A Both parties do agree on	11:08:57
2	take.	11:05:52	2	reasonable terms when a negotiation is	11:09:01
3	Q What types of terms do you	11:05:54	3	concluded.	11:09:44
4	consider to be important to patent holders that	11:05:57	4	Q Can you explain why you believe	11:09:46
5	simply aren't available in this nonnegotiable	11:06:03	5	that pool rates fail to reflect commercially	11:09:50
6	patent pool context?	11:06:05	6	reasonable rates?	11:09:51
7	A Term, termination provisions,	11:06:07	7	A Well, as I say in my report	11:09:56
8	scope of the grant, terms such as that, such as	11:06:14	8	typically patent pools are created by	11:10:01
9	those I should say.	11:06:21	9	organizations who have patents relative to the	11:10:06
10	Q When we're dealing with standard	11:06:24	10	standards that are essential to the standard	11:10:09
11	essential patents, aren't those typically	11:06:29	11	and who are also manufacturers of products.	11:10:11
12	accounted for in context of patent holders'	11:06:33	12	And they want to promote that standard because	11:10:17
13	RAND commitment?	11:06:35	13	it will incorporate technology familiar to them	11:10:21
14	MR. PEPE: Objection form.	11:06:38	14	that they are, that they are using in	11:10:24
15	A Can you ask the question again or	11:06:39	15	downstream products, and so it is in their	11:10:30
16	could I have it repeated.	11:06:40	16	interest since they will become both licensors	11:10:35
17	Q The term termination and scope	11:06:42	17	and licensees to have low rates they will be	11:10:38
18	provisions that you were referring to, those	11:06:45	18	paying out more than they will be receiving and	11:10:42
19	are typically accounted for in the standard	11:06:49	19	the lower the rate the better off they are as	11:10:46
20	setting organizations requirements for the	11:06:55	20	licensees.	11:10:51
21	patent holder -- let me start over.	11:07:04	21	Q The low rates you say are a	11:10:53
22	When a patent holder like Motorola	11:07:09	22	benefits to licensees, but do they benefit	11:10:58
23	makes a RAND commitment to a standard setting	11:07:11	23	licensors?	11:10:59
24	organization, do you have an understanding of	11:07:14	24	A They can benefit some licensors.	11:11:04
25	what that commitment requires the patent holder		25	For example there maybe licensors in a pool who	
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1	are, who have no ability to license on their	11:11:19	1	some of the economists define consensus a	11:15:49
2	own and so they accept the low rates because	11:11:23	2	little differently than I do. Do you mean	11:15:55
3	they expect to receive a guaranteed income,	11:11:29	3	everybody has to agree?	11:15:57
4	royalty income and lower rates attract more	11:11:32	4	Q Well, there is a -- strike that.	11:16:13
5	licensees and so the volume of royalty	11:11:36	5	Are there any type of firms that	11:16:18
6	increases, the low rates can benefit them.	11:11:44	6	you would typically see pushing for higher	11:16:21
7	Q Can you describe the typical	11:11:46	7	royalty rates in these negotiations?	11:16:25
8	process for creating a patent pool?	11:11:54	8	MR. PEPE: Which negotiations so	11:16:28
9	A As I understand the process it is,	11:11:57	9	we're clear.	11:16:30
10	it is formed or it precedes from the agreement	11:12:09	10	Q In negotiations regarding the	11:16:32
11	among a number of companies who have technology	11:12:13	11	formation of the patent pool?	11:16:36
12	related to the standard that a pool would be	11:12:18	12	A I would expect that those folks	11:16:39
13	beneficial to them to license their patents	11:12:24	13	who are identified as pure licensors for	11:16:42
14	collectively and to cross license each other.	11:12:29	14	example universities in the H.264 pool. I	11:16:50
15	The specific negotiations that might go on	11:12:33	15	think Columbia University was one that I would	11:16:52
16	among them I'm not privy to and I'm sure they	11:12:39	16	identify as perhaps urging a high royalty rate	11:16:58
17	differ from case to case.	11:12:46	17	because they have no downstream licensee,	11:17:03
18	Q So you don't know how a patent	11:12:49	18	licensee interest or interest as a licensee.	11:17:07
19	pool typically arrives at the final licensing	11:12:53	19	Q Are you aware of any situation in	11:17:10
20	terms?	11:12:54	20	which a standard essential patent owner was	11:17:15
21	A I think it arrives by discussion	11:12:56	21	involved in these formative negotiations,	11:17:19
22	among the patent holders who are throwing their	11:13:01	22	agreed to the licensing terms and then choose	11:17:22
23	patents into the pool.	11:13:11	23	not to become a licensor?	11:17:26
24	Q Well, the patents are placed into	11:13:15	24	A I am, I am not specifically	11:17:28
25	the pool until after the terms are finalized,		25	familiar with that, no. I understand that	
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1	correct?	11:13:19	1	happens.	11:17:34
2	A Well the pool is organized around	11:13:23	2	Q Do you have any understanding of	11:17:36
3	the standard and patents of the licensors that	11:13:27	3	whether that occurred in connection with either	11:17:40
4	are found to be essential to that standard.	11:14:09	4	the H.264 or the 802.11 pools in this case?	11:17:47
5	Q If someone is involved in the	11:14:12	5	A I am not close enough to what went	11:17:51
6	negotiations surrounding formation of a pool	11:14:16	6	on amongst the prospective pool members to know	11:17:54
7	has any concerns with the licensing terms being	11:14:21	7	the answer to that, I know that Microsoft has	11:18:05
8	debated, would you expect those concerns to be	11:14:24	8	an attitude about that or has a position on	11:18:07
9	expressed to the others involved in the	11:14:30	9	that whether it's an active position I don't	11:18:09
10	formation process?	11:14:32	10	know. I simply don't have enough information.	11:18:12
11	A I would expect so, yes.	11:14:43	11	Q What is the prospective of	11:18:14
12	Q Why is that?	11:14:47	12	Microsoft that you are aware of?	11:18:16
13	A Well, I think that all of the	11:14:50	13	A Well, it seems to me that I've	11:18:19
14	participants in the formation of the pool	11:14:52	14	read somewhere they said Motorola pulled out at	11:18:23
15	expressed their opinions concerning what the	11:14:55	15	the last minute. I don't know whether that's	11:18:25
16	terms and conditions of what the pool license	11:14:58	16	true or not true.	11:18:28
17	would be, how they will divvy up the royalties	11:15:04	17	Q If the evidence showed that	11:18:29
18	that come from licensing, and what the	11:15:08	18	Motorola had agreed to the license in terms of	11:18:34
19	licensing rates will be, those are all	11:15:11	19	the pool and then opted not to join as a	11:18:37
20	considerations that they have to agree on as	11:15:15	20	licensor, would that have any impact on what a	11:18:44
21	the pool is formed.	11:15:30	21	commercially reasonable rate for Motorola	11:18:46
22	Q Do the licensing terms typically,	11:15:33	22	patents would be?	11:18:53
23	the licensing terms that are ultimately adopted	11:15:35	23	A I don't think so I think Motorola	11:18:55
24	are consensus driven?	11:15:40	24	is bound by its commitment to the standard	11:19:00
25	A You have to define consensus I see		25	organizations to offer commercially reasonable	
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1	RAND terms, and if and to the extent that	11:19:12	1	A I understand that the Nokia	11:23:30
2	Motorola did back out as you say, if that was	11:19:17	2	portfolio is very strong. My pride tells me	11:23:37
3	your term, I would expect they did it for a	11:19:21	3	that IBM's portfolio is probably pretty strong	11:23:41
4	legitimate business reason.	11:19:23	4	but I don't know that to be a fact.	11:23:43
5	Q You don't have any insight as to	11:19:25	5	Q On what basis are you founding	11:23:47
6	what that reason might be?	11:19:27	6	that view that Nokia's portfolio was strong?	11:23:52
7	A I do not.	11:20:06	7	A I believe that I read in the	11:23:54
8	Q Do you have any sense of what	11:20:07	8	literature that Nokia had the largest portfolio	11:23:58
9	impact on the ultimate licensing terms of the	11:20:13	9	relative to the standard.	11:24:03
10	H.264 pool it would of had if Motorola had	11:20:16	10	Q Is it possible that Nokia's H.264	11:24:07
11	advocated for much higher royalty rates?	11:20:22	11	patent portfolio is more valuable than	11:24:12
12	MR. PEPE: Objection calls for	11:20:23	12	Motorola's?	11:24:13
13	speculation, form.	11:20:26	13	A I have no way of assessing that.	11:24:18
14	A I don't have any, I don't have	11:20:28	14	Q So it could be?	11:24:20
15	enough knowledge to form an opinion on that	11:20:32	15	A It could be it could be of less	11:24:22
16	Q What do you view as the benefits	11:20:35	16	value I don't know.	11:24:26
17	of patent pools?	11:20:37	17	Q Can you tell anything about the	11:24:30
18	A Well, the benefits are the	11:20:40	18	value of the -- strike that. Can you tell	11:24:37
19	provision of a single license for a collection	11:20:43	19	anything about the value of Motorola's H.264	11:24:42
20	of patents at a low rate with low transaction	11:20:47	20	patent portfolio based on a review of	11:24:47
21	costs and a uniform license.	11:20:55	21	Motorola's licensing agreement with Nokia?	11:24:54
22	Q Does it also permit and encourage	11:20:57	22	MR. PEPE: Objection form outside	11:24:56
23	a wider use in adoption of the technology?	11:21:00	23	the scope of his expert report.	11:24:58
24	A Certainly.	11:21:01	24	A I did not evaluate, I did not	11:25:02
25	Q Is that a benefit to Motorola?		25	examine that license agreement and so I have --	
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1	A I think the pool to the extent	11:21:11	1	I cannot answer the question.	11:25:24
2	that it encourages wide use of the technology	11:21:17	2	Q Do you have any view on why the	11:25:27
3	is a benefit to all of the participants in that	11:21:24	3	holder of a strong patent portfolio would	11:25:32
4	technology.	11:21:25	4	choose not to become a licensor?	11:25:35
5	Q Including Motorola?	11:21:27	5	A Yes, I think that the holder of a	11:25:41
6	A I would guess yes, um-hmm, but	11:21:31	6	strong patent portfolio might chose not to	11:25:41
7	again that's, you know, that's not within what	11:21:35	7	become a licensor because it has the ability to	11:25:46
8	I was asked to opine on.	11:22:12	8	license those patents bilaterally and depending	11:25:53
9	Q You have no personal experience	11:22:15	9	on its attitude toward licensing may not wish	11:25:59
10	with either the H.264 or the 802.11 pools?	11:22:19	10	to have its patents licensed by a third party.	11:26:05
11	A That is correct.	11:22:47	11	I can tell you that within, in specific	11:26:09
12	Q Do you know why Nokia, Motorola,	11:22:53	12	instances where IBM examined patent pools in	11:26:14
13	IBM decided not to become licensors of the	11:22:57	13	connection with individual standards that was a	11:26:18
14	802.11 pool?	11:22:59	14	very strong consideration that we did not want	11:26:21
15	A I have no specific insight to	11:23:00	15	our patents to be under the control of a third	11:26:26
16	that.	11:23:01	16	party.	11:26:28
17	Q You say they likely at paragraph	11:23:04	17	Q Why would the holder of a strong	11:26:30
18	50, that they likely did not join the pool	11:23:08	18	patent portfolio like Nokia advocate low pool	11:26:37
19	because of the strength of their large standard	11:23:09	19	rates?	11:26:44
20	essential patent holdings?	11:23:12	20	A Why would a patent holder of a	11:26:47
21	A That seems likely to me, yes, but	11:23:16	21	strong portfolio, if that patent holder is also	11:26:51
22	as I say I have no specific knowledge.	11:23:19	22	a substantial manufacturer and the pool would	11:26:58
23	Q Do you have any view regarding the	11:23:22	23	contain patents of its competitors under which	11:27:02
24	relative value of any of these companies	11:23:25	24	it desired to have a license or license to	11:27:05
25	portfolios?		25	practice the standard, it would advocate low	
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1	rates because it's going to pay more than it's	11:27:12	1	of the H.264 standard and the 802.11 standard	11:46:02
2	going to receive in royalties under the pool.	11:27:23	2	has benefited Motorola?	11:46:05
3	Q Do you know whether Nokia or IBM	11:27:27	3	MR. PEPE: Objection form.	11:46:07
4	were involved in the negotiations relating to	11:27:29	4	A Broad adoption of the standard	11:46:12
5	the formation of the H.264 pool?	11:27:32	5	has, see I don't know that that's necessarily	11:46:18
6	A I do not know.	11:27:52	6	true. It certainly could be the case, broad	11:46:22
7	Q Is there any advantage to the	11:27:54	7	adoption of the standard benefits those who	11:46:27
8	holder of a strong patent portfolio to advocate	11:27:59	8	have technology pertinent to the standard.	11:46:32
9	for low royalty rates but then opt not to	11:28:04	9	Q Like Motorola?	11:46:34
10	become a licensor?	11:28:11	10	A If Motorola has that technology it	11:46:36
11	A Would you ask it, is there any	11:28:13	11	would be included, yes.	11:46:45
12	advantage did you say? Maybe I missed the	11:28:26	12	Q Would a rate so high that	11:46:47
13	question.	11:28:27	13	Microsoft choose to exclude support for the	11:46:51
14	Q That's not a very good question.	11:28:43	14	standard in its products be a commercially	11:46:54
15	MR. PEPE: What about a short	11:28:45	15	reasonable rate?	11:47:01
16	break since we've been going since the.	11:28:49	16	A It could be depending on what	11:47:04
17	Q Yeah, let me just ask one more	11:28:51	17	Microsoft's specific interests were, how	11:47:09
18	question to wrap up?	11:28:54	18	committed it was to the technology. There are,	11:47:18
19	MR. PEPE: Sure.	11:28:54	19	I guess are many motivations for a company to	11:47:22
20	Q So you consider both Microsoft and	11:28:55	20	decide not to play.	11:47:25
21	Motorola to be vertically integrated companies?	11:29:01	21	Q So, so I understand a commercially	11:47:27
22	A Yes, I think both companies own	11:29:04	22	reasonable rate for H.264 patents can include a	11:47:33
23	patents relative to the standard and I think	11:29:07	23	right that Microsoft would not pay?	11:47:39
24	both companies manufacture and sell products	11:29:09	24	A Well, to the extent that Microsoft	11:47:41
25	that embody the standard, and that's my		25	is in control of whatever it decides to do or	
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1	definition of vertically integrated company.	11:29:19	1	not do that's true.	11:47:59
2	Q Okay, let's take a break.	11:29:21	2	Q How is that consistent with your	11:48:02
3	VIDEOGRAPHER: We're going off the	11:29:22	3	earlier testimony that commercially reasonable	11:48:05
4	record the time is 11:29.		4	rate is a rate that both the licensee and the	11:48:08
5	(Whereupon, at 11:29 a.m., a recess		5	patent holder would agree to?	11:48:11
6	was taken to 11:44 a.m.)		6	A Well, it's consistent in that you	11:48:14
7	(The deposition resumed with all		7	said that Microsoft might decide not to pay --	11:48:16
8	parties present.)	11:44:58	8	it's in control of its own determination. If	11:48:21
9	VIDEOGRAPHER: We're now back on	11:44:59	9	you had said that Microsoft should agree to pay	11:48:24
10	the record the time is 11:44.	11:45:03	10	then may be my answer could be different I	11:48:27
11	Q Do you agree that if a pool sets	11:45:05	11	don't know. I'm saying that a commercially	11:48:30
12	its rates too high there's a risk that	11:45:09	12	reasonable rate is a rate that both the	11:48:32
13	downstream manufacturers decide not to include	11:45:12	13	licensor and the licensee can agree is	11:48:36
14	the technology in their products?	11:45:16	14	appropriate for their cross license or for	11:48:41
15	A I think that is a potential, yes.	11:45:20	15	their license, I'm sorry.	11:48:43
16	Q When the MPEG LA H.264 pool is	11:45:25	16	Q And so if a pool rate is so high	11:48:46
17	formed, would it have been in Motorola's	11:45:28	17	that Microsoft chooses not to support that	11:48:50
18	interest to insure that the rates were low	11:45:31	18	technology, can you tell whether that pool rate	11:48:54
19	enough that that didn't happen?	11:45:38	19	is commercially reasonable or not?	11:48:58
20	MR. PEPE: Objection form	11:45:39	20	MR. PEPE: Objection form.	11:49:02
21	speculation.	11:45:43	21	A I don't -- I don't think that one	11:49:05
22	A I don't know -- I don't know -- I	11:45:45	22	would make a determination of reasonableness	11:49:08
23	don't know enough about Motorola's interest to	11:45:49	23	based on Microsoft's specific intentions	11:49:13
24	answer that question.	11:45:55	24	because one doesn't know the basis for those	11:49:17
25	Q Broad adoption of the standard --		25	intentions.	
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1	Q Is your view that one of the	11:49:38	1	patents are in a patent pool, are you with me	11:53:13
2	purposes of pool rates being low is to entice	11:49:44	2	so far, okay, the court reporter can't record	11:53:19
3	manufacturers to become licensees; is that	11:49:47	3	your head nods?	11:53:20
4	fair?	11:49:49	4	A Yes, I'm with you so far.	11:53:22
5	A That's a fair statement, yes.	11:49:52	5	Q The patent pool has adopted a	11:53:26
6	Q Would it be commercially	11:49:54	6	license rate of X and the licensee feels that	11:53:32
7	reasonable for the patent pool rate to be so	11:49:59	7	that rate X is too high and on that bases	11:53:37
8	high that it does not achieve that goal?	11:50:04	8	refuses to pay it, are you with me?	11:53:40
9	A Would it be commercially	11:50:07	9	A Yes, the perspective licensee	11:53:42
10	reasonable for a patent pool rate to be so high	11:50:11	10	doesn't take the pool license.	11:53:47
11	that it doesn't entice manufacturers to join	11:50:18	11	Q Correct. Is there -- can you tell	11:53:49
12	the pool, well, when you say commercially	11:50:23	12	me any reason why that licensee would pay more	11:53:54
13	reasonable, I think we're talking about two	11:50:27	13	than X for a license to the single standard	11:53:57
14	different things. A pool rate which is set so	11:50:32	14	essential patent outside of the pool?	11:54:00
15	high that it doesn't include or that it doesn't	11:50:37	15	MR. PEPE: Objection form, asked	11:54:01
16	entice a downstream manufacturer to take	11:50:42	16	and answered, incomplete hypothetical.	11:54:04
17	licenses would not be an effective pool rate,	11:50:45	17	A I think I did answer that when I	11:54:07
18	doesn't, doesn't mean that that rate would not	11:50:51	18	said there are other forms of compensation,	11:54:09
19	be a commercially reasonable rate. I think	11:50:53	19	other aspects of a bilateral negotiation that	11:54:12
20	we're talking about two different things when	11:50:56	20	would differ from the limited license that's	11:54:15
21	we're talking about pools and bilateral	11:50:59	21	offered by the pool.	11:54:18
22	negotiated rates.	11:51:10	22	Q And what would those be -- let's	11:54:23
23	Q Doesn't it indicate that if a	11:51:13	23	simplify the hypothetical. I'm really just	11:54:25
24	licensee is unwilling to pay a pool rate that	11:51:16	24	talking about a license to that single non pool	11:54:30
25	it would also be unwilling to pay a higher rate		25	standard essential patent. We're not talking	
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1	in any bilateral negotiations?	11:51:27	1	about a cross license or any other benefits to	11:54:36
2	MR. PEPE: Objection form.	11:51:36	2	the licensee. Is there any reason that you can	11:54:40
3	A I don't know that that follows,	11:51:37	3	think of that that licensee would have an	11:54:44
4	no.	11:51:38	4	interest in licensing that single standard	11:54:46
5	Q Maybe let's put it this way: If a	11:51:43	5	essential patent that's outside of the pool?	11:54:52
6	licensee chooses not to pay a pool rate to	11:51:46	6	MR. PEPE: Objection form.	11:54:54
7	implement standard technology, then is there	11:51:51	7	A Well again, the terms and	11:54:57
8	any reason that you can think of that that	11:51:55	8	conditions that he can negotiate with the	11:55:01
9	licensee would want to purchase a license to	11:51:59	9	licensor outside of the pool are going to be	11:55:04
10	other standard essential patents related to	11:52:03	10	different than the terms and conditions he's	11:55:08
11	that same technology?	11:52:05	11	forced to accept within the pool.	11:55:10
12	MR. PEPE: Outside of the pool?	11:52:07	12	Q And can you think of any reason	11:55:12
13	Q Outside of the pool.	11:52:09	13	why that licensee would want to pay more for	11:55:15
14	MR. PEPE: Objection form	11:52:09	14	that single standard essential patent than the	11:55:19
15	incomplete hypothetical.	11:52:11	15	licensee refused to pay for the nine patents in	11:55:23
16	A I think there could be a lot of	11:52:14	16	the pool?	11:55:26
17	reasons why one would decide to engage in the	11:52:19	17	MR. PEPE: Objection form asked	11:55:26
18	bilateral negotiation, for example bilateral	11:52:21	18	and answered.	11:55:28
19	negotiations can include cross licenses.	11:52:23	19	A Yeah, I don't know what else to	11:55:30
20	Compensation can be in the form of other than	11:52:27	20	tell you. The bilateral negotiation is a	11:55:33
21	the limited compensation that is offered by a	11:52:32	21	completely different animal from the pool	11:55:38
22	pool license.	11:52:38	22	arrangement and I, frankly I'm not clear how	11:55:45
23	Q So if you assume that there are	11:53:02	23	your hypothetical comports with reality.	11:55:51
24	ten standard essential patents, this is my	11:53:06	24	Q Well, Microsoft is entitled to	11:55:54
25	hypothetical, nine of those standard essential		25	their license to Motorola standard essential	
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1	patents, correct?	11:55:59	1	they are generally not interested in policing	11:59:47
2	A In accordance with Motorola's	11:56:01	2	the reasonable asset pool of royalty rates?	11:59:52
3	commitment to offer a RAND arrangement, yes.	11:56:10	3	A I am not aware of that, no.	11:59:54
4	Q And Microsoft presumably may be	11:56:13	4	Q Would that change your view as	11:59:54
5	willing to pay some amount for rights to those	11:56:18	5	stated in your report that low royalty rates	11:59:58
6	licenses, right?	11:56:22	6	help patent pools survive antitrust scrutiny?	11:59:59
7	A They should be willing to pay a	11:56:25	7	A If the antitrust authorities said	12:00:01
8	RAND rate, yes.	11:56:30	8	we don't care about pools and we're not going	12:00:01
9	Q And so I'm having trouble	11:56:32	9	to look at pools any more I suppose that could	12:00:06
10	understanding why you think it would be	11:56:34	10	affect that, but that still would not affect my	12:00:14
11	reasonable for Microsoft to pay Motorola more	11:56:38	11	opinion as to the difference between pools and	12:00:19
12	for that remaining standard essential patent	11:56:43	12	bilateral negotiations.	12:00:32
13	than it refuse to pay for all of the other	11:56:48	13	Q Can you explain why you think that	12:00:33
14	standard essential patents in the pool?	11:56:52	14	excessive, paragraph 41 same paragraph, you	12:00:37
15	MR. PEPE: Objection form,	11:56:52	15	indicate that royalty provisions that impose	12:00:39
16	incomplete hypothetical, outside the	11:56:56	16	excessive fees on licensees may allow the pool	12:00:43
17	scope of his expert report.	11:56:59	17	participants to fix prices for downstream	12:00:45
18	A Has it indeed done that?	11:57:01	18	products. So first of all can you explain what	12:00:49
19	Q The question is whether you can	11:57:03	19	you mean by excessive fees?	12:00:54
20	explain why that would be reasonable?	11:57:06	20	A Well I'm really keying in on what	12:01:00
21	MR. PEPE: Objection form, outside	11:57:08	21	the supreme court said in standard oil and what	12:01:08
22	the scope of his expert report.	11:57:11	22	Joel Klein refers to in his business letters	12:01:12
23	A Again I would say I don't see how	11:57:14	23	that if the, if the license rates in the pool	12:01:19
24	that comports with reality.	11:57:53	24	are low enough they will not allow price	12:01:25
25	Q You say at one point that I think		25	fixing. Now the extent to which and the way in	
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1	this is paragraph 41 that the low royalty rates	11:57:57	1	which pools could perform price fixing I'm not	12:01:35
2	also help patent pools survive antitrust	11:58:03	2	specifically aware of.	12:01:37
3	scrutiny, can you tell me what you mean by	11:58:05	3	Q I think my question was a little	12:01:40
4	that?	11:58:06	4	different, what did you mean by excessive fees?	12:01:44
5	A I mean that the antitrust	11:58:09	5	A I mean higher royalty.	12:01:49
6	authorities including the justice department	11:58:14	6	Q High compared to what?	12:01:50
7	look hard at pools and that's why these	11:58:21	7	A Compared to what the justice	12:01:52
8	business letters are asked for and received and	11:58:28	8	department would feel could not allow price	12:02:00
9	that pool -- any collective licensing	11:58:33	9	fixing.	12:02:03
10	arrangement has the potential for mischief such	11:58:37	10	Q And looking at a pool rate, how do	12:02:07
11	as price fixing. And so that that's why the	11:58:42	11	you know whether that's low, modest or	12:02:11
12	antitrust department that's one of the reasons	11:58:47	12	excessive?	12:02:12
13	the antitrust department looks at them, and if	11:58:55	13	A Well, I know that -- I don't know	12:02:16
14	pool rates are low the likelihood of price	11:59:00	14	what a specific excessive rate would be but I	12:02:19
15	fixing is negligible and the antitrust	11:59:08	15	know that the rates that Joel Klein has	12:02:26
16	authorities accept those, agree not to	11:59:12	16	accepted as low enough not to create antitrust	12:02:31
17	challenge those pools. I think that is born	11:59:16	17	problems are the rates that are in the pools	12:02:35
18	out by the letters that Joe Klein has written	11:59:24	18	that are identified in his letters.	12:02:43
19	to the attorneys that I referred to in my	11:59:27	19	Q How would high pool rates allow	12:02:46
20	letter, in my opinion.	11:59:29	20	pool participants to fix downstream prices?	12:02:50
21	Q And those were letters from the	11:59:31	21	A I'm not specifically aware of the	12:02:53
22	late 1990s?	11:59:32	22	techniques that would cause that to happen. I	12:02:56
23	A I think that's correct, yes.	11:59:35	23	can only tell you that's something the justice	12:03:00
24	Q Are you aware that the antitrust	11:59:38	24	department is concerned about and mentioned	12:03:03
25	agencies have much more recently indicated that		25	that low rates do not do it, so I assume the	
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1 justice department is aware that high rates can 12:03:11	1 two? 12:06:12
2 allow price fixing. 12:03:12	2 A I don't believe they are, no. 12:06:14
3 Q And that understanding again is 12:03:14	3 Q Why do you think that that is a 12:06:16
4 based on standard oil and your reading of the 12:03:17	4 relevant comparison? 12:06:19
5 letters from the late 1990s? 12:03:21	5 A Well simply a higher rate than I 12:06:22
6 A Reading -- yes, that's true. 12:03:26	6 see in the pools that we're looking at now so I 12:06:25
7 Q Do you have any sense of whether 12:03:28	7 assume it's closer to a RAND rate and whether 12:06:29
8 there would be antitrust concerns if the H.264 12:03:33	8 its within or not I don't have a specific 12:06:33
9 or the 802.11 pools attempted to charge rates 12:03:37	9 knowledge of. 12:06:35
10 that were equivalent to those depicted by 12:03:40	10 Q And so is your opinion simply 12:06:38
11 Motorola or Microsoft? 12:03:44	11 based on the dollar amounts that the MPEG two 12:06:42
12 MR. PEPE: Objection form, outside 12:03:46	12 pool was charging unattached from any 12:06:50
13 the scope. 12:03:48	13 considerations of value? 12:06:54
14 A I don't know what the antitrust 12:03:50	14 A Can you ask that question again I 12:06:56
15 department's attitude would be. 12:04:11	15 don't understand it. 12:06:59
16 Q Is it your view that there are 12:04:12	16 Q When your, it seems to me that 12:07:02
17 some patent pools that charge rates equivalent 12:04:15	17 when you have stated that the H.264 or 802.11 12:07:06
18 to the royalty rates that would be charged 12:04:18	18 pools are low, your view is based on comparing 12:07:10
19 outside of the pool in the context of bilateral 12:04:21	19 those pool rates with some benchmark, correct? 12:07:15
20 negotiations? 12:04:25	20 A Comparing those pool rates with 12:07:17
21 A There is the possibility that 12:04:28	21 what I see to be normal industry rates, yes. 12:07:20
22 pools could charge rates for the collective 12:04:32	22 Q And those normal industry rates 12:07:22
23 license that would be within the range of a 12:04:35	23 that you are thinking of, are those specific to 12:07:25
24 RAND rate. However I think you need to keep in 12:04:43	24 H.264 and 802.11 technology or do they go 12:07:31
25 mind that those pool rates do not equate to the	25 beyond that scope? 12:07:31
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1 royalties that the individual licensors receive 12:04:49	1 A Well, no, I think they do go 12:07:36
2 for their patents in the rule. Those rates are 12:04:54	2 beyond but certainly incorporate the H.264 and 12:07:40
3 fractions of the pool rate. 12:05:00	3 802.11 bilateral rates. 12:07:46
4 Q Can you identify any specific 12:05:02	4 Q And your assessment of the MPEG 12:07:48
5 patent pools that you believe charge rates 12:05:06	5 two pool rates seems, as I understand it, to be 12:07:51
6 equivalent to the rates that would be charged 12:05:10	6 somewhat different in that you're not 12:07:54
7 outside of the patent pool? 12:05:13	7 considering any comparison between those pool 12:07:57
8 A I believe the MPEG two pool rate 12:05:17	8 rates and rates achieved via bilateral 12:08:03
9 that was in the neighborhood of four, \$5 was 12:05:25	9 negotiations associated with that same MPEG two 12:08:08
10 perhaps at the low end of a commercially 12:05:29	10 technology? 12:08:09
11 reasonable rate. But again that was the 12:05:33	11 A Maybe you're not understanding my 12:08:11
12 collective rate that a licensee pays not the 12:05:36	12 answer or my answer was unclear. I'm simply 12:08:15
13 royalty that the licensor receives. 12:05:39	13 saying that the MPEG two rates were high 12:08:19
14 Q And in order to develop your 12:05:40	14 compared to the rates that I see in these pools 12:08:22
15 opinion that the MPEG two pool rates were 12:05:46	15 and may well approach commercially reasonable 12:08:25
16 inline with bilaterally negotiated rates, you 12:05:51	16 rates. I have no specific knowledge that they 12:08:28
17 need to know what rates are being charged in 12:05:54	17 do. 12:08:29
18 these bilateral negotiation licensing 12:05:57	18 Q Okay, so they're high in 12:08:31
19 agreements, right? 12:05:59	19 comparison to the H.264 and 802.11 pool rates; 12:08:34
20 A Well, I'm really looking at the 12:06:01	20 is what you are saying? 12:08:36
21 rates that I'm familiar with in that industry 12:06:03	21 A That's I think that's correct. 12:08:38
22 in general including the rates that are in 12:06:06	22 They seem to be although I have not studied 12:08:42
23 Motorola's license agreements with its 12:06:08	23 them in enough detail to be completely 12:08:45
24 licensees. 12:06:09	24 confident in that. 12:08:47
25 Q But those are not specific to MPEG	25 VIDEOGRAPHER: This marks the end
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1	of tape number two we are going off the	12:08:51	1	based on the sale price of the end product	01:01:11
2	record the time is 12:08.		2	computer?	01:01:13
3	(Whereupon, at 12:08 p.m., a recess		3	MR. PEPE: Objection, form.	01:01:13
4	was taken to 12:59 p.m.)		4	Outside the scope of his expert report.	01:01:18
5	(The deposition resumed with all		5	Speculation.	01:01:19
6	parties present.)	12:59:07	6	A I would have to -- I guess I would	01:01:21
7	VIDEOGRAPHER: Here marks the	12:59:08	7	have to see a specific situation to answer that	01:01:25
8	beginning of tape number three. We're	12:59:10	8	with any clarity.	01:01:37
9	back on the record. The time is 12:59.	12:59:15	9	Q So let's say you have a laptop	01:01:40
10	Q Sir, earlier this morning we were	12:59:18	10	that's a thousand dollars.	01:01:42
11	talking about IBM's licensing practices and you	12:59:22	11	A Um-hmm.	01:01:42
12	recall we discussed that IBM had licensed disk	12:59:25	12	Q Do you have a sense of how much	01:01:44
13	drive manufacturers and semiconductor	12:59:29	13	disk drives cost at the time IBM was licensing	01:01:48
14	manufacturers.	12:59:30	14	disk drive manufacturers?	01:01:51
15	Do you recall that?	12:59:31	15	A I really don't, no, not at this	01:01:55
16	A Yes.	12:59:32	16	point.	01:01:55
17	Q What were the -- the rates that	12:59:34	17	Q If we say a hundred dollars as a	01:01:56
18	IBM charged for a license to its patents	12:59:40	18	hypothetical, that doesn't seem completely out	01:01:56
19	relating to optical disk drive technology was	12:59:47	19	of line?	01:01:57
20	between 1 and 5 percent?	12:59:49	20	A You can make that assumption,	01:02:00
21	A Yes, the rates we charged for that	12:59:52	21	yeah.	01:02:00
22	technology would have the same as any other.	12:59:54	22	Q So IBM was typically charging	01:02:03
23	Q Okay. And that was applied to the	12:59:56	23	between 1 and 5 dollars for that 100-dollar	01:02:07
24	cost of the price of the disk drive?	12:59:59	24	disk drive?	01:02:09
25	A Selling price of the -- of the		25	A If that was the sales price of the	
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1	apparatus that contained the patents, yes.	01:00:02	1	disk drive by the disk drive manufacturer.	01:02:17
2	Q Which in that case would --	01:00:04	2	Q And again, referring to the	01:02:18
3	A Would have been the disk drive,	01:00:07	3	hypothetical where the end product, personal	01:02:21
4	um-hmm.	01:00:08	4	computer or laptop costs a thousand dollars, if	01:02:26
5	Q And did IBM -- did you consider	01:00:11	5	the 1 to 5 percent royalty rate were applied to	01:02:32
6	that royalty rate to be commercially	01:00:13	6	that laptop or PC, the end result or the	01:02:37
7	reasonable?	01:00:15	7	resulting royalty would be between 10 and \$15?	01:02:43
8	A Yes, um-hmm.	01:00:17	8	A If in fact -- now, wait a minute.	01:02:44
9	Q And RAND as well?	01:00:21	9	Where do we get the 10 and \$15?	01:02:47
10	MR. PEPE: Objection to form,	01:00:21	10	Q I'm sorry, between 10 and \$50?	01:02:58
11	outside the scope of his expert report.	01:00:25	11	A Typically in a situation such as	01:03:01
12	Go ahead.	01:00:26	12	that the manufacturer of the larger product	01:03:04
13	A Yeah, I think our rates were	01:00:27	13	would need licenses as well and would be paying	01:03:08
14	reasonable and our practices were reasonable	01:00:32	14	royalties.	01:03:09
15	and nondiscriminatory.	01:00:33	15	Q But a moment ago you just said	01:03:12
16	Q And those disk drives and	01:00:36	16	that it was -- or I understood that you were	01:03:13
17	semiconductors motherboards would then be	01:00:41	17	saying it was typical for the disk drive	01:03:15
18	incorporated into a computer by a computer	01:00:42	18	manufacturer as part of its license from IBM,	01:03:19
19	manufacturer typically; is that right?	01:00:47	19	that it would be entitled to sell that product	01:03:22
20	A That, yes, if we licensed a disk	01:00:51	20	to the PC manufacturer?	01:03:25
21	drive manufacturer, a manufacturer would sell	01:00:55	21	A Yes. And the patents that were	01:03:27
22	disk drives to an OEM probably.	01:01:00	22	within that product would be exhausted, but not	01:03:31
23	Q Would it have been commercially	01:01:01	23	patents that would be covering combinations of	01:03:31
24	reasonable in your view to charge the disk	01:01:05	24	that product with other apparatus.	01:03:35
25	drive manufacturer a royalty rate percentage		25	Q And then so IBM might for example	
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1	have to engage in a licensing negotiation with	01:03:41	1	assume you have the same licensing agreement in	01:06:29
2	the ultimate manufacturer of the PC or laptop	01:03:45	2	place that in fact was in place, would it have	01:06:32
3	as well?	01:03:46	3	been reasonable for IBM to charge 10 to 50	01:06:37
4	A Typically we would, yes.	01:03:48	4	percent?	01:06:38
5	Q But not for the same patents that	01:03:51	5	MR. PEPE: Objection, form,	01:06:38
6	had already been licensed to the disk drive	01:03:54	6	foundation, speculation, incomplete	01:06:41
7	manufacturer?	01:03:56	7	hypothetical.	01:06:46
8	MR. PEPE: Objection, form.	01:03:58	8	A If you're asking me whether it's	01:06:48
9	A Once a patent is licensed for a	01:04:05	9	reasonable to charge one licensee 5 percent and	01:06:54
10	particular good it's exhausted with respect to	01:04:06	10	another licensee 50 percent for the same	01:06:58
11	that good.	01:04:07	11	patents, I would say that probably is not	01:07:01
12	Q So the answer is no to my	01:04:10	12	reasonable.	01:07:03
13	immediately prior question?	01:04:12	13	Q Knowing nothing else, just the	01:07:04
14	A I guess I need the question again	01:04:14	14	royalty rate, 10 to 50 percent?	01:07:07
15	to be sure.	01:04:16	15	A Yes, all other things being	01:07:07
16	Q So in that situation, IBM would	01:04:19	16	perfectly equal, I think that's probably	01:07:10
17	not be engaging in a licensing negotiating with	01:04:24	17	correct.	01:07:11
18	the end manufacturer, the seller of the PC with	01:04:26	18	Q It is correct that that would not	01:07:13
19	respect to the same patents that have already	01:04:29	19	be commercially reasonable?	01:07:15
20	been licensed to the disk drive manufacturer?	01:04:33	20	MR. PEPE: Objection to form.	01:07:16
21	A Not with respect to the exhausted	01:04:34	21	A I think if that -- if all other	01:07:18
22	patents, that's right.	01:04:42	22	things being equal, that probably -- you're --	01:07:21
23	Q And so in this hypothetical again,	01:04:53	23	you are correct, that would not be reasonable.	01:07:29
24	if IBM had been applying its 1 to 5 percent	01:04:59	24	Q Did IBM license agreements ever	01:07:32
25	royalty rate to the ultimate value of the PC,		25	include annual caps?	
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1	but charging that rate against the disk drive	01:05:08	1	A IBM's license agreements took all	01:07:43
2	manufacturer, a disk drive manufacturer would	01:05:11	2	kinds of forms and had very different terms	01:07:53
3	be paying between 10 and \$50 on a 100-dollar	01:05:18	3	based on -- on what was happening. For	01:07:55
4	disk drive.	01:05:19	4	example, if we had a cross license we might	01:07:58
5	Do you follow that?	01:05:21	5	well have some royalty portion in that cross	01:08:02
6	A I follow that, yes.	01:05:22	6	license and some royalty free portion. In that	01:08:07
7	Q Would a 10 to 50 percent royalty	01:05:27	7	situation we might well have caps. It's	01:08:10
8	rate, effective royalty rate apply to the disk	01:05:31	8	possible, yes.	01:08:12
9	drive manufacturer be reasonable?	01:05:37	9	Q And just eliminating cross	01:08:14
10	MR. PEPE: Objection, form,	01:05:38	10	licensing agreements, in a licensing out	01:08:18
11	speculation, incomplete hypothetical.	01:05:40	11	situation, would those licensing agreements	01:08:21
12	A Well, it would depend on -- on	01:05:42	12	also occasionally have annual caps?	01:08:25
13	what rights were transferred to the disk drive	01:05:46	13	A Typical licensing agreements would	01:08:28
14	manufacturer. And it would depend on -- on if	01:05:49	14	not.	01:08:29
15	the disk drive manufacturer were in a position	01:05:53	15	Q When would annual caps be included	01:08:32
16	to indemnify his -- his customer with respect	01:05:59	16	in a licensing agreement?	01:08:43
17	to IBM patents, then you might well pay more	01:06:05	17	A My -- my -- my recollection is	01:08:46
18	than 5 percent. But these are, you know,	01:06:07	18	that the only kind of annual caps we might have	01:08:51
19	you're -- it's hard to answer the hypothetical	01:06:11	19	considered would be caps on the number of	01:08:54
20	questions because I don't remember these	01:06:15	20	products that could be -- be sold under the	01:08:58
21	situations ever having actually occurred.	01:06:15	21	license. I don't recall in a standard kind of,	01:09:03
22	Q Well, I don't think they would	01:06:16	22	a vanilla kind of agreement, that we would have	01:09:08
23	have occurred and I believe, you know, the 10	01:06:18	23	annual caps on the royalty amount absent some	01:09:14
24	to 50 percent rate would have been commercially	01:06:21	24	other provisions in the agreement that would	01:09:17
25	unreasonable. The question, though, is if you		25	make that sensible.	
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1	Q So before lunch we had started to	01:09:24	1	in this case?	01:12:40
2	talk about a few of the other pools that aren't	01:09:30	2	A That is correct.	01:12:41
3	directly at issue in this case.	01:09:33	3	Q Or to any similar negotiations	01:12:43
4	A Um-hmm.	01:09:33	4	with respect to any other patent pools?	01:12:49
5	Q And I was asking about how one	01:09:36	5	A I have not participated in	01:12:51
6	would be able to discern whether the patent	01:09:40	6	negotiating to form a patent pool.	01:13:06
7	pool rate is high, low or consistent with what	01:09:46	7	Q You note or mention later in that	01:13:07
8	you view as commercially reasonable.	01:09:49	8	paragraph on the next page that, "Founders who	01:13:12
9	Have you developed any opinion as	01:09:52	9	are confident that the standard to which their	01:13:15
10	to any specific patent pool where it falls	01:09:58	10	pool applies is so superior to alternative	01:13:18
11	along that spectrum?	01:10:02	11	technologies that it would be the, quote, only	01:13:22
12	A Well, I have -- I have formed the	01:10:03	12	game in town, unquote, who will tend to choose	01:13:27
13	opinion that the H.264 pool has a low royalty	01:10:09	13	higher rates and would be the case of the	01:13:29
14	rate and I formed an opinion that the 811 or	01:10:12	14	standard has more substantial market based	01:13:32
15	803.11, if I'm correct.	01:10:17	15	competition."	01:13:32
16	Q 802.11.	01:10:18	16	When you refer to the only game in	01:13:35
17	A 802.11 patent pool has a low rate,	01:10:19	17	town, what did you mean?	01:13:38
18	lower than I would expect a commercially	01:10:22	18	A Remember, this is just my view. I	01:13:41
19	reasonable bilateral negotiation to produce.	01:10:26	19	don't -- I have in the participated in any of	01:13:43
20	Q With respect to any other patent	01:10:29	20	these. But it seems to me that -- that if the	01:13:53
21	pool, did you come to any conclusion as to	01:10:32	21	standard technology is so strong that there are	01:13:57
22	whether the rates offered by that pool are	01:10:35	22	no competing technologies of value, that that	01:14:02
23	high, low, or somewhere in between?	01:10:38	23	could influence the pool rate. Not that it	01:14:08
24	A I did not -- did not form opinions	01:10:40	24	necessarily would, but that it could.	01:14:11
25	with respect to other pools.		25	The founders may nevertheless	
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1	Q You mentioned at one point that	01:10:58	1	decide that it's in their interest as licensees	01:14:17
2	variations and pool rates could be attributed	01:11:00	2	as well as licensors to have an extremely low	01:14:21
3	to, quote, give-and-take negotiations and	01:11:03	3	rate.	01:14:50
4	considerations discussed among the pool's	01:11:06	4	Q So confidence in the superiority	01:14:51
5	founders, unquote. This is paragraph 43.	01:11:11	5	of a standard would tend to push royalty rights	01:14:56
6	What did you mean when you	01:11:12	6	higher than otherwise?	01:14:57
7	referred to the give-and-take negotiations?	01:11:15	7	A It could. It wouldn't necessarily	01:14:59
8	This is at the bottom of page 21.	01:11:34	8	do so.	01:15:00
9	A Um-hmm. Well, what I -- what I'm	01:11:36	9	Q Would it tend to have that same	01:15:02
10	referring to is what must have gone on during	01:11:40	10	affect in bilateral negotiations?	01:15:06
11	the formation of the pool in the discussions	01:11:43	11	MR. PEPE: Objection, form.	01:15:10
12	among the founders as to what the rate should	01:11:47	12	Q Would confidence in the	01:15:11
13	be. Obviously, there was give and take in	01:11:51	13	superiority of a standard tend to push royalty	01:15:14
14	those discussions. But as I say here, without	01:11:54	14	rates higher in the context of bilateral	01:15:16
15	knowledge of those negotiations one can only	01:11:57	15	negotiation?	01:15:18
16	speculation as to -- as to what the give and	01:12:00	16	MR. PEPE: Objection, form.	01:15:20
17	take was.	01:12:02	17	A Well, you need to -- to -- to	01:15:23
18	Q And you're referring to the	01:12:04	18	consider this in view of the commitment to --	01:15:27
19	negotiations that took place before the	01:12:09	19	to provide RAND terms and conditions and rates,	01:15:33
20	licensing terms were ultimately adopted?	01:12:13	20	and so my view is that those, that commitment	01:15:42
21	A These, yes, I'm referring to the	01:12:16	21	will -- will cause the rates to be RAND	01:15:44
22	negotiations that concluded with the rate.	01:12:30	22	irrespective of the strength of the -- of the	01:15:46
23	Q And you personally are not privy	01:12:34	23	standard. I mean there is a range of rates	01:15:51
24	to any of the negotiations relating to	01:12:34	24	within RAND, within what's considered RAND, I	01:15:54
25	formation of either of the two pools at issue		25	think.	
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1	Q So if a bilateral negotiation	01:16:02	1	royalty and my view is that the, as I say	01:19:55
2	takes place before anyone knows that this	01:16:07	2	here -- I'm looking at the wrong page, sorry.	01:20:08
3	standard will be the only game in town, are the	01:16:11	3	As I say, "The RAND rate is one	01:20:11
4	negotiations going to tend to result in a	01:16:14	4	that offers the patent holder a fair and	01:20:13
5	different rate than once the standard has	01:16:18	5	commercially reasonable return," as we have	01:20:15
6	actually become the only game in town?	01:16:23	6	discussed, "without exhibiting patent hold up."	01:20:19
7	MR. PEPE: Objection, form.	01:16:24	7	That means that it is indeed a	01:20:22
8	A I think in terms of the only game	01:16:27	8	RAND rate. It's still -- it is fair and	01:20:25
9	in town business, one knows whether that	01:16:30	9	reasonable. And in my view that's what happens	01:20:28
10	technology is superior before the standard is	01:16:34	10	in bilateral negotiations. I don't -- I don't	01:20:31
11	formed as well as one knows that it's superior	01:16:37	11	accept that this inevitability that the	01:20:36
12	after the standard is formed.	01:16:48	12	economists posit.	01:20:40
13	Q Are you equating the actual	01:16:50	13	Q When you refer to the term patent	01:20:42
14	technical superiority of a standard with	01:16:55	14	hold up, what does that mean to you?	01:20:47
15	whether that standard will become the only game	01:17:00	15	A Well, I'm referring to it in the	01:20:50
16	in town?	01:17:00	16	terms that the economists use, and that is that	01:20:52
17	A Well --	01:17:01	17	it's -- that it is the charging of a rate which	01:20:54
18	MR. PEPE: Objection, form.	01:17:03	18	is beyond what is fair and reasonable.	01:21:11
19	A -- I think you need to look at	01:17:05	19	Q In your view what is the	01:21:13
20	what my statement is. I said, I say it could	01:17:09	20	relationship between a fair and commercially	01:21:16
21	be, in my view, could be that if the formers of	01:17:14	21	reasonable rate and a market rate?	01:21:22
22	the standard are -- if that standard is so	01:17:20	22	A I think fair and reasonable rates	01:21:27
23	superior to alternative technologies that could	01:17:23	23	are -- are -- are within market rates.	01:21:45
24	be used as a standard, that it will be, that it	01:17:27	24	Q How do they differ, if at all?	01:21:50
25	will be the only game in town, that nobody will		25	MR. PEPE: Objection, form.	
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1	select the alternative technologies, then in	01:17:37	1	A I don't know that they do, they	01:21:54
2	that case the rates could be higher, not	01:17:41	2	differ -- I should say I know that they do.	01:21:56
3	necessarily would be higher.	01:18:10	3	They differ in the respect that fair and	01:22:00
4	Q In your view, does wide adoption	01:18:12	4	reasonable rates are rates that are constrained	01:22:04
5	of a standard to the exclusion of other	01:18:18	5	by a commitment. Market rates are not so	01:22:07
6	possible alternatives render that standard the	01:18:21	6	constrained and can differ.	01:22:18
7	only game in town?	01:18:24	7	Q Would you view a market rate as	01:22:20
8	MR. PEPE: Objection, form.	01:18:24	8	the rate that the market would bear?	01:22:24
9	Outside the scope of his expert report.	01:18:30	9	A No, I think market rates are the	01:22:27
10	A Does wide adoption -- no, it	01:18:34	10	rates that the market does bear. They are the	01:22:32
11	doesn't make it the only game in town. It may	01:18:40	11	rates that exist in the market, not necessarily	01:22:35
12	make it the most attractive game in town.	01:19:00	12	the highest rates that could be achieved.	01:22:42
13	Q You note in paragraph 64 that a	01:19:04	13	Q And so how do those -- how are	01:22:45
14	RAND rate -- I'll let you flip pages. It's	01:19:09	14	those rates determined other than via bilateral	01:22:50
15	pages 33, the last two lines.	01:19:15	15	negotiations?	01:22:52
16	A Um-hmm.	01:19:16	16	MR. PEPE: Which rates?	01:22:53
17	Q You said, among other things, that	01:19:18	17	Q The market rates.	01:22:55
18	a fair -- I'm sorry, that a RAND rate is one	01:19:23	18	A They are determined by bilateral	01:22:57
19	that offers the patent holder a fair and	01:19:29	19	negotiations.	01:23:00
20	commercially reasonable return, that, and among	01:19:31	20	Q And similarly you have indicated	01:23:00
21	other things, does not exhibit patent hold up.	01:19:34	21	that commercially reasonable rates would be	01:23:03
22	A Um-hmm.	01:19:34	22	determined by bilateral negotiations?	01:23:06
23	Q How do you define patent hold up?	01:19:39	23	A Correct.	01:23:08
24	A Well, patent hold up I think is	01:19:43	24	Q So how can you distinguish the	01:23:11
25	defined by the economists as being an excessive		25	outcome of the bilateral negotiation, is it	
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1	whether it's a market rate or a commercially	01:23:17	1	A I don't know how one would really	01:27:15
2	reasonable rate?	01:23:19	2	determine that. I think parties to a	01:27:20
3	MR. PEPE: Objection, form.	01:23:20	3	negotiation start typically with some -- with	01:27:23
4	Go ahead.	01:23:21	4	some difference in opinion as to -- as to where	01:27:27
5	A Well, I simply am saying that the	01:23:24	5	they should end up, but they always end up	01:27:32
6	RAND rate is a rate that's constrained by the	01:23:29	6	in -- in an arrangement which is acceptable to	01:27:36
7	RAND commitment. The market rate may well be	01:23:31	7	both and when it's an arrangement pursuant to a	01:27:39
8	the same. It is simply not a rate that's	01:23:35	8	standard commitment I think they end up at a	01:27:42
9	constrained.	01:23:37	9	fair and reasonable rate.	01:27:44
10	Q And how does the licensee benefit	01:23:40	10	Q In your view does a -- does what	01:27:46
11	from that constraint in the context of a	01:23:45	11	amounts to a fair and reasonable rate for a	01:27:50
12	bilateral negotiation?	01:23:48	12	given standard essential patent change over	01:27:54
13	A The licensee benefits from the --	01:23:50	13	time?	01:27:56
14	from the RAND obligation by receiving a RAND	01:23:56	14	MR. PEPE: Objection, outside the	01:28:00
15	rate. He can be assured because of the RAND	01:24:01	15	scope.	01:28:05
16	commitment that he will only pay a fair and	01:24:05	16	A I -- I don't know that it couldn't	01:28:10
17	reasonable rate, commercially fair and	01:24:09	17	simply because I don't know what conditions may	01:28:16
18	reasonable rate.	01:24:33	18	change over time. But I would not expect it	01:28:22
19	Q Do you agree that pool rates do	01:24:36	19	to -- to be markedly different over time.	01:28:25
20	not include hold up value?	01:24:40	20	Again, these are case specific situations.	01:28:29
21	A I would agree that they do not	01:24:44	21	Q Well, you have expressed the view	01:28:31
22	because I don't think market rates reflect hold	01:24:48	22	that fair and reasonable royalties would be	01:28:35
23	up value. I think hold up is -- is a	01:24:53	23	achieved through negotiations and according	01:28:40
24	theoretical problem. It's not one that you	01:24:55	24	with existing market conditions. This is page	01:28:44
25	have seen in my years of practice as a		25	3.	
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1	licensing attorney. At least not among	01:25:11	1	A Um-hmm. I see it, yeah.	01:28:47
2	sophisticated companies such as ones I deal	01:25:18	2	Q And so that indicates to me that	01:28:54
3	with or did deal with.	01:25:37	3	you're expressing an opinion that what is fair	01:28:56
4	Q Is there any way that you're aware	01:25:39	4	and reasonable could change as market	01:29:02
5	of to discern whether a royalty rate that is	01:25:47	5	conditions change?	01:29:03
6	being offered includes hold up value?	01:25:52	6	A It certainly could, yes, but	01:29:06
7	MR. PEPE: Objection, form.	01:25:53	7	without knowing what those market conditions	01:29:08
8	Outside the scope.	01:26:01	8	changes are it's not -- it's not possible to	01:29:10
9	A I have -- I have not experienced	01:26:04	9	say what the result would be.	01:29:13
10	hold up situations so I'm not sure I would	01:26:08	10	Q Well, that's -- it goes to my next	01:29:17
11	recognize that beast if it had occurred.	01:26:11	11	question which is what market conditions are	01:29:20
12	Because in my experience it doesn't occur.	01:26:20	12	you referencing here that could have an impact	01:29:23
13	Q And to clarify, it doesn't occur	01:26:23	13	on these negotiations?	01:29:28
14	at the end of -- as a result of a negotiation	01:26:27	14	A Market conditions such as the --	01:29:31
15	nor during the course of a negotiation in your	01:26:31	15	the emergence of a new technology which is	01:29:39
16	experience?	01:26:31	16	superior to the standard technology.	01:29:42
17	A Well, I think -- I think by	01:26:33	17	Q Okay. Let's pause there. And	01:29:44
18	definition your definition of hold up must	01:26:37	18	that would tend to degrees the what would be	01:29:48
19	relate to the -- to the conclusion of the	01:26:40	19	considered a fair and reasonable royalty?	01:29:54
20	negotiation. Many things go on during a	01:26:44	20	A It could, yes. It could decrease	01:29:58
21	negotiation that don't become incorporated in	01:26:49	21	the royalty that the parties were willing to	01:30:02
22	the agreement as it finally exists.	01:26:54	22	agree on. But as I say, the fair and	01:30:05
23	Q And so during the negotiation is	01:26:57	23	reasonable or the RAND rate is a range of rates	01:30:09
24	it possible to identify whether the rate being	01:27:02	24	so I think in that case it would still be	01:30:14
25	sought includes hold up value?		25	within.	
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1	Q Okay. So that's one type of	01:30:17	1	license he has plans to bring a product to	01:33:24
2	market condition, the emergence of a new	01:30:18	2	market.	01:33:24
3	standard or new technology that competes with	01:30:20	3	Q So when you refer to existing	01:33:26
4	the existing standard, correct?	01:30:22	4	market conditions as impacting the	01:33:28
5	A Um-hmm.	01:30:23	5	negotiations, one of those market conditions	01:33:32
6	Q Can you think of any other market	01:30:25	6	would be whether or not or at what stage of	01:33:36
7	conditions that would impact what the parties	01:30:28	7	development the licensees' products is?	01:33:40
8	would view as fair and reasonable royalties for	01:30:32	8	A That's not really what I was	01:33:42
9	a standard essential patent?	01:30:35	9	referring to. I was referring to more	01:33:44
10	A I'm sure there are many. I think	01:30:36	10	generally to such things as -- as economic	01:33:47
11	that perhaps general economic condition could	01:30:42	11	conditions, the existence of other -- external	01:33:50
12	have an impact.	01:30:45	12	conditions as opposed to what's going on	01:33:53
13	Q And could it result in increased	01:30:50	13	between the licensor or the licensee.	01:33:57
14	royalties or decreased royalties of either?	01:30:57	14	Q Okay. In your view is it going to	01:34:00
15	A I would typically expect it to	01:30:58	15	be relevant to the negotiations whether the	01:34:03
16	produce a decrease in royalty.	01:31:08	16	licensee has already brought its products	01:34:05
17	Q Any other market conditions that	01:31:10	17	implementing the technology to market?	01:34:10
18	you can think of?	01:31:12	18	MR. PEPE: Objection, form, asked	01:34:10
19	A Off hand as I sit here, I can't.	01:31:13	19	and answered.	01:34:12
20	I'm sure there are others.	01:31:17	20	A Within the context of a RAND	01:34:17
21	Q Do you believe that the	01:31:20	21	commitment, I don't believe so. I think the	01:34:20
22	possibility of a licensee sales being enjoined	01:31:26	22	licensor is committed to offer a RAND rate	01:34:23
23	is something that would impact bilateral	01:31:32	23	irrespective of whether the licensee has or has	01:34:28
24	negotiation?	01:31:33	24	not yet produced a product.	
25	MR. PEPE: Objection, form.		25	(Document was marked as Plaintiff's	
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1	Outside the scope.	01:31:49	1	Exhibit No. 331 for identification,	
2	A I -- I don't know that it would in	01:31:50	2	as of this date.)	01:35:30
3	a real world negotiation in that -- in -- in my	01:31:57	3	Q So you've been now handed what's	01:35:33
4	licensing experience, the potential or	01:32:00	4	now been marked as Exhibit 331.	01:35:36
5	possibility of an injunction is always in	01:32:04	5	A Um-hmm.	01:35:37
6	existence. It's one of the remedies that's	01:32:06	6	Q And this -- well, first of all, do	01:35:37
7	available to a license or a patent.	01:32:12	7	you recognize this as one of the documents that	01:35:40
8	Q And does the existence of that	01:32:14	8	you relied on and cited in your report?	01:35:44
9	risk impact the negotiations?	01:32:18	9	A This, the title says it is, yes.	01:35:47
10	MR. PEPE: Objection, asked and	01:32:18	10	Q And if you can turn to page 10,	01:35:50
11	answered. Outside the scope.	01:32:22	11	the last paragraph beginning, "By analogy." Do	01:35:53
12	A I think, again, to the extent that	01:32:25	12	you see that?	01:36:02
13	the licensor is committed to a RAND license,	01:32:34	13	A Um-hmm.	01:36:02
14	don't think the fact that he could enjoin the	01:32:38	14	Q It says, "The reasonableness of	01:36:05
15	licensee would necessarily or would -- would	01:32:42	15	license terms for a patent essential to	01:36:07
16	cause the license to be concluded at a higher	01:32:51	16	practice a standard will depend on a number of	01:36:12
17	rate. I think -- I think that that, that	01:32:54	17	variables including when the license	01:36:13
18	potential is always in the background, I don't	01:32:58	18	negotiation takes place."	01:36:15
19	think it becomes a big playing card.	01:33:01	19	Do you agree with that?	01:36:23
20	Q Is it in the background if the	01:33:04	20	A I need to read the whole thing in	01:36:27
21	potential licensee has not yet brought its	01:33:08	21	order to understand what's being said.	01:36:31
22	product to market?	01:33:12	22	Q Well, how much do you believe --	01:36:32
23	A Sure, because the licensee doesn't	01:33:15	23	this is -- this is a document that you --	01:36:35
24	need a license until it brings a product to	01:33:19	24	A No, I'm reading the paragraph. I	01:36:36
25	market. Obviously, if he's negotiating for a		25	just don't want to take the sentence out of	
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1	context.	01:36:41	1	Is it your view that the resulting	01:41:29
2	Q Absolutely.	01:37:33	2	royalty rate that results from bilateral	01:41:34
3	A No. I take the import of this to	01:37:39	3	negotiations will be the same regardless of	01:41:36
4	be that the that there is no substantial	01:37:44	4	when those bilateral negotiations take place?	01:41:41
5	departure from a -- from a RAND license based	01:37:48	5	MR. PEPE: Objection, form.	01:41:42
6	on the time. I think if I read it correctly --	01:37:51	6	Go ahead.	01:41:44
7	it says, "The analogy consistent with at most	01:38:09	7	A My answer is that if the licensor	01:41:48
8	determining reasonable license terms and	01:38:11	8	has committed to a RAND commitment,	01:41:52
9	conditions," context may require that the only	01:38:14	9	irrespective when -- of when the license	01:41:57
10	time a standard is sufficiently final -- that	01:38:18	10	negotiation takes place, I think the result	01:42:01
11	only at the time a standard is sufficiently	01:38:21	11	will be a RAND rate.	01:42:04
12	final and is possible to establish that a	01:38:24	12	MR. WION: Can you read back my	01:42:04
13	patent is essential can such determination be	01:38:30	13	question.	
14	made.	01:38:31	14	(The requested portion of the	
15	Q I'm not sure if that answers the	01:38:34	15	record was read back.)	01:42:23
16	question. Do you believe that a reasonable --	01:38:36	16	Q I understood your response in	01:42:25
17	a reasonableness of license terms would depend	01:38:40	17	effect to be an affirmative, yes?	01:42:28
18	on when a license negotiation takes place?	01:38:48	18	A No, that -- it is -- my answer is	01:42:33
19	MR. PEPE: Objection, form.	01:38:53	19	that the rate will be a RAND rate irrespective.	01:42:38
20	A I think I've already answered,	01:38:54	20	Will it be precisely the same rate, I don't	01:42:42
21	that in my view that if the -- if the RAND	01:39:01	21	know. I don't know what -- what give and take	01:42:45
22	commitment exists, then I don't know that there	01:39:04	22	may -- may go on during the negotiation based	01:42:46
23	is a difference in the result based upon when	01:39:10	23	on the timing of the negotiation. But I'm --	01:42:51
24	the negotiation takes place.	01:39:23	24	but I'm convinced that the rate will be a RAND	01:42:55
25	Q So that's a no?		25	rate because that's what the licensor is	
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1	THE WITNESS: Maybe you can read	01:39:27	1	committed to and is obliged to provide.	01:43:02
2	it back. I think it's a no.		2	Q So the timing of the bilateral	01:43:04
3	(The requested portion of the		3	negotiation can affect the rate, but your view	01:43:07
4	record was read back.)	01:39:44	4	is that whatever that rate is it will be RAND?	01:43:12
5	MR. PEPE: I think he needs the	01:39:45	5	A If the licensor has committed to a	01:43:15
6	question. Can we go back to the	01:39:48	6	RAND rate, I think he grant a RAND rate or the	01:43:18
7	question.		7	parties will agree upon a RAND rate.	01:43:23
8	(The requested portion of the		8	Q And as part of your earlier	01:43:25
9	record was read back.)	01:40:18	9	response it seems that you were indicating that	01:43:28
10	A And I think my ultimate answer was	01:40:20	10	timing could affect the actual rate?	01:43:31
11	no. I think the reasonable, if there is a	01:40:22	11	A It could affect terms and	01:43:33
12	reasonableness commitment, the reasonableness	01:40:25	12	conditions and possibly the rate, yes. But	01:43:37
13	exists irrespective of time.	01:40:28	13	again, I don't think it would cause the rate to	01:43:39
14	Q So in your view it shouldn't	01:40:30	14	be beyond a RAND rate.	01:43:42
15	matter when a bilateral negotiation takes	01:40:34	15	MR. PEPE: And again, just for the	01:43:43
16	place?	01:40:35	16	record, this whole line of questioning	01:43:45
17	MR. PEPE: Objection to form.	01:40:35	17	is outside the scope of his expert	01:43:48
18	Matter to what?	01:40:39	18	report. We object on that basis.	01:43:50
19	Q To the ultimate rate that is	01:40:40	19	MR. WION: I think we can sort	01:43:52
20	determined at the end of this bilateral	01:40:44	20	that out at some other point.	01:43:55
21	negotiation. Let me -- let me clarify that.	01:40:47	21	MR. PEPE: I'm just making my	01:43:57
22	So in your view, do you believe	01:40:51	22	record.	01:44:08
23	that the bilateral negotiation could take place	01:40:56	23	Q Was there anything in	01:44:08
24	at any point along the spectrum -- let me try	01:41:08	24	particular -- were there any license agreements	01:44:10
25	that again. Strike that.		25	in particular that you had in mind when you	
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1	were opining that the H.264 -- strike that.	01:44:27	1	licensing history in supporting your analysis	01:47:27
2	Did you consider any license	01:44:29	2	that the pool rates are low?	01:47:37
3	agreements when determining that the H.264 and	01:44:35	3	A To the extent that I was aware of	01:47:39
4	802.11 pool rates were quote/unquote low?	01:44:40	4	Motorola's licensing history in connection	01:47:41
5	MR. PEPE: Objection, form.	01:44:43	5	with, for example, the materials that I looked	01:47:49
6	A I -- I had in mind the general	01:44:46	6	at from Charles Donahue's report, I considered	01:47:54
7	practices in the industry but there were no	01:44:49	7	it, but it wasn't the basis of my opinion.	01:48:03
8	specific rates that I looked at. What I did	01:44:52	8	Q So you can't point to any Motorola	01:48:05
9	was to look at the motivations and incentives	01:44:56	9	license agreements that indicate that the pool	01:48:13
10	of the group of potential licensors and what	01:45:02	10	rates for either the H.264 or the 802.11 pools	01:48:17
11	their inclinations would be in accordance with	01:45:06	11	are comparatively low?	01:48:23
12	my own experience and of course what I see in	01:45:08	12	A Well, I can -- I can say that --	01:48:25
13	the literature.	01:45:09	13	that I'm aware of license agreements involving	01:48:30
14	Q So there were, to be clear, there	01:45:10	14	Motorola that had rates of for example 1.7	01:48:36
15	were no actual license agreements that you	01:45:13	15	percent. And I think that when one compares	01:48:42
16	reviewed that informed your analysis of whether	01:45:18	16	those with the rates, the returns that	01:48:46
17	these pool rates were low or not?	01:45:22	17	licensors in the pools receive, they are	01:48:50
18	A I did not base my conclusion on	01:45:25	18	extremely low.	01:48:51
19	specific license agreements, if that's an	01:45:28	19	Q Do you know what was being	01:48:53
20	answer to your question.	01:45:29	20	licensed for 1.7 percent?	01:48:57
21	Q Did you review any license	01:45:31	21	A Not specifically, no.	01:49:13
22	agreements --	01:45:31	22	Q Do you know whether in addition to	01:49:16
23	A I --	01:45:34	23	the 1 percent term there were any cross	01:49:19
24	Q -- as part of this process?	01:45:37	24	licensing provisions in the agreement that	01:49:21
25	A I became aware of license		25	you're referring to?	
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1	agreements. Those license agreements, for	01:45:41	1	A By the agreement I'm referring	01:49:28
2	example, that Charles Donohue considered in his	01:45:47	2	to -- what -- what agreement are you referring	01:49:30
3	report, and in that fashion and in connection	01:45:50	3	to?	01:49:31
4	with my own experience in the industry I have a	01:45:56	4	Q Well, let me ask this. Do you	01:49:33
5	general, a general feeling of what typical	01:46:03	5	have any particular license agreement in mind	01:49:36
6	bilateral net license agreements might produce.	01:46:09	6	when you refer to the 1.7 percent royalty rate?	01:49:42
7	Q It's --	01:46:10	7	A Not specifically. I am aware	01:49:47
8	A But in reviewing the -- the -- the	01:46:13	8	that -- that I saw that rate as a -- as a	01:49:49
9	pool agreements, it's clear that the rates that	01:46:20	9	license out rate from Motorola to one or more	01:49:55
10	are available to the individual licensors in	01:46:24	10	licensors -- licensees. I cannot tell you who	01:50:01
11	the pool for their patents are extremely low.	01:46:28	11	they were nor did I review the details of their	01:50:05
12	MR. WION: I'm not sure that was	01:46:30	12	agreements.	01:50:06
13	responsive so I move to strike on that	01:46:34	13	Q And you don't know whether -- what	01:50:09
14	basis.	01:46:35	14	other patents were involved or what other	01:50:13
15	Q Did you -- and I can make this	01:46:37	15	standards may have been involved?	01:50:15
16	easy I think. In the documents cited that are	01:46:41	16	A I do not know that. I simply know	01:50:16
17	listed in your report, I didn't see any	01:46:43	17	that those -- that was a rate and it seemed to	01:50:19
18	Motorola license agreements that were listed or	01:46:46	18	me to be within the rates that I find to be	01:50:23
19	any Microsoft license agreements that were	01:46:49	19	consistent with the industry practices that I'm	01:50:26
20	listed.	01:46:49	20	aware of.	01:51:59
21	Did you review any Microsoft	01:46:51	21	Q Paragraph 60 of your report?	01:52:02
22	agreements or Motorola agreements in connection	01:46:55	22	MR. PEPE: 60?	01:52:04
23	with the preparation of this report?	01:46:58	23	MR. WION: 60, yes.	01:52:05
24	A I don't believe I did, no.	01:47:19	24	Q This is on page 31, I believe?	01:52:07
25	Q Did you rely on Motorola's		25	A Um-hmm.	
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1	Q The second line of that paragraph	01:52:11	1	it, no.	01:55:21
2	60 you write, "Important standard related	01:52:14	2	Q Did you ask to see it?	01:55:23
3	patents can be licensed at royalties that	01:52:15	3	A No.	01:55:27
4	represent fair and reasonable market rates."	01:52:21	4	Q Why not?	01:55:29
5	What did you mean when you said	01:52:22	5	A I didn't think it was important to	01:55:31
6	important standard related patents?	01:52:25	6	my conclusion. It was simply another --	01:55:34
7	MR. PEPE: And just for the	01:52:27	7	another factor that -- that was considered.	01:55:45
8	record, that was just a fragment of the	01:52:31	8	Q Would knowing the ultimate rates	01:55:47
9	entire sentence.	01:52:33	9	concluded between those two parties in a	01:55:51
10	MR. WION: Correct.	01:52:34	10	bilateral negotiation impact your analysis with	01:55:55
11	A Well, certainly you standards	01:52:35	11	respect to the -- with respect to whether the	01:55:57
12	related patents that are -- that are necessary	01:52:39	12	802.11 patent pool rates are low?	01:56:02
13	for practicing the standard. Important	01:52:45	13	A No, I don't think -- I don't think	01:56:02
14	standard related patents might be equated with	01:52:48	14	it would. You know, unless it was a rate that	01:56:07
15	standard essential patents.	01:52:49	15	would have returned a -- a royalty to one of	01:56:12
16	Q I see, okay. So rather than	01:52:50	16	the licensors of zero for example.	01:56:18
17	saying important standard relating patents, you	01:52:54	17	Q Anything other than zero simply	01:56:20
18	could just as easily have substituted standard	01:52:56	18	would have been irrelevant to your analysis?	01:56:22
19	essential patents can be licensed at royalties	01:52:57	19	A Well, I don't know that it would	01:56:24
20	that represent fair an reasonable market rates?	01:53:01	20	have been irrelevant but it would not have	01:56:26
21	A Let me read the sentence with that	01:53:04	21	controlled the analysis. I think I -- I would	01:56:28
22	in it and see.	01:53:20	22	have reached the same conclusion irrespective	01:56:31
23	Q Sure.	01:53:20	23	of having known about this S or CZIRO license.	01:56:40
24	A Yes.	01:53:55	24	Q So you were never informed that	01:56:42
25	Q At the very bottom of page 35		25	the ultimate rates amounted to effectively 20	
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1	you -- you mention a licensing offer by CSIRO,	01:54:04	1	cents per unit give or take?	01:56:49
2	C-I-S-R-O.	01:54:07	2	A No, I was not.	01:57:22
3	A Um-hmm.	01:54:07	3	Q Do you have any view on whether a	01:57:24
4	Q To Microsoft. You mention that	01:54:09	4	standard essential patent holder should be	01:57:27
5	the offer was a royalty rate of 2 to \$4 in	01:54:14	5	entitled to a higher royalty rate for its	01:57:30
6	connection with CSIRO's 802.11 standard	01:54:18	6	patent as the standard becomes more widely	01:57:39
7	essential?	01:54:19	7	adopted?	01:57:40
8	A Yes, I think that I saw that in	01:54:21	8	MR. PEPE: Objection, form.	01:57:40
9	the materials provided.	01:54:23	9	Outside the scope.	01:57:43
10	Q Okay. What relevance did you	01:54:25	10	A I have not -- I have not formed a	01:57:48
11	attribute to CSIRO's offer?	01:54:31	11	specific opinion of that except to say that I	01:57:52
12	A Well, simply that it is a rate	01:54:35	12	don't think the fact that a standard is widely	01:57:58
13	which is far above the 20-cent CSIRO rate,	01:54:37	13	adopted really controls the RAND rate that a	01:58:02
14	that's an H2 -- H.264, or the 802.11, which is	01:54:47	14	bilateral negotiation should produce.	01:58:29
15	50 cents or something like that.	01:54:50	15	Q You discuss the circumstances	01:58:38
16	Q So are you relying on that offer	01:54:53	16	surrounding ex-anti negotiations. Can you tell	01:58:42
17	to support your conclusion that the 802.11 pool	01:54:56	17	me what you mean when you refer to ex-anti	01:58:45
18	rates are low?	01:54:58	18	negotiations?	01:58:47
19	A That is -- is information that	01:55:04	19	A Well, as I understand the ex-anti	01:58:49
20	helps to inform that decision, yes. I'm not	01:55:07	20	multilateral negotiations are those which are	01:58:54
21	necessarily relying on it.	01:55:10	21	described by the economists in Microsoft's	01:58:59
22	Q Was the actual concluded agreement	01:55:13	22	expert reports, and as I understand them, they	01:59:03
23	between CSIRO and Microsoft made available to	01:55:18	23	are supposedly negotiations among all of the	01:59:09
24	you?	01:55:19	24	owners of patents that would be essential to a	01:59:13
25	A I don't recall having looked at		25	standard and that they would arrive at -- at a	
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1	royalty which each of the patent owners could	01:59:26	1	we're trading rights for rights. I don't know	02:02:50
2	expect to receive in a -- in a licensing	01:59:33	2	that that is true in a RAND negotiation.	02:03:00
3	situation.	01:59:38	3	Q Why would it be different?	02:03:03
4	Is that an answer to your	01:59:40	4	A Well, if -- if a patent owner is	02:03:06
5	question?	02:00:02	5	obliged to offer fair and reasonable rates	02:03:09
6	Q You also state that patent owners	02:00:05	6	under its patents, it must do that. If a	02:03:14
7	have a natural tendency to inflate the value of	02:00:10	7	licensor or if two licensing partners are	02:03:18
8	their patents?	02:00:12	8	trying to decide whose pistol is bigger and who	02:03:25
9	MR. PEPE: Can you tell us where	02:00:13	9	ought to be paying whom, they might well each	02:03:29
10	you're reading from?	02:00:15	10	want to inflate the value of their patents so	02:03:34
11	Q This is page 41.	02:00:17	11	that in the exchange their patents become worth	02:03:38
12	A I'm referring to the difficulty	02:00:19	12	more or considered or treated to be worth more.	02:03:42
13	that I can imagine if these	02:00:24	13	I think it exists in a rights for	02:03:45
14	ex-anti-multilateral negotiations really could	02:00:30	14	rights or in a situation where you're trying to	02:03:49
15	really exist simply saying that they would not	02:00:35	15	divide up a sum of money and see who gets what	02:03:56
16	be easy or quick. Fact is I don't think they	02:00:38	16	percentage of it.	02:04:09
17	can exist in reality.	02:00:40	17	MR. PEPE: So we're about an hour	02:04:11
18	Q Well, I guess I'm interested in	02:00:43	18	and five. What do think about having a	02:04:13
19	something a little bit different. This natural	02:00:46	19	short break.	02:04:13
20	tendency of a patent owner to inflate the value	02:00:49	20	MR. WION: It's a fine time for	02:04:13
21	of its patents, I understand that your view	02:00:53	21	it.	02:04:14
22	would be that this tendency exists within	02:00:59	22	VIDEOGRAPHER: We're going off the	02:04:15
23	multilateral discussion or within any other	02:01:02	23	record. The time is 2:04.	
24	type of discussion. In other words, that	02:01:04	24	(Whereupon, at 2:04 p.m., a recess	
25	tendency isn't impacted one way or the other.		25	was taken to 2:23 p.m.)	
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1	I'll try again.	02:01:15	1	(The deposition resumed with all	
2	Is -- did you intend to indicate	02:01:17	2	parties present.)	02:23:05
3	that patent owners generally have a tendency to	02:01:22	3	VIDEOGRAPHER: Here marks the	02:23:06
4	inflate the value of their patents?	02:01:26	4	beginning of tape number four. We are	02:23:08
5	A I am indicating that in a	02:01:28	5	back on the record the time is 2:23.	
6	negotiation such as this where they're trying	02:01:30	6	BY MR. WION:	02:23:14
7	to determine who gets what size, slice of the	02:01:37	7	Q So, in order to compare a license	02:23:18
8	pie, patent owners would tend to inflate the	02:01:41	8	agreement with a percentage based royalty rate	02:23:23
9	value of their patents.	02:01:43	9	with a per unit rate, do you need to know the	02:23:28
10	Q And in bilateral negotiations do	02:01:45	10	appropriate royalty base?	02:23:33
11	you believe that the tendency to inflate the	02:01:48	11	A If you are attempting to make a	02:23:38
12	value of the patent holders patents does not	02:01:51	12	comparison in order to equate dollars to	02:23:42
13	similarly exist?	02:01:54	13	percentages you would need to know the base,	02:23:47
14	A I find it to exist in cross	02:01:57	14	yes.	02:23:57
15	license negotiations where patent owners are	02:02:01	15	Q And do you have an understanding	02:23:59
16	trying to conclude whose patents are worth more	02:02:08	16	of the rate base that Motorola was targeting in	02:24:02
17	in a cross license.	02:02:22	17	connection with its offer demands of Microsoft?	02:24:11
18	Q Are you describing something here	02:02:24	18	MR. PEPE: Objection outside the	02:24:13
19	other than an opening negotiation posture?	02:02:28	19	scope.	02:24:14
20	MR. PEPE: Objection, form.	02:02:31	20	A I don't have any personal	02:24:16
21	Q At the beginning of a bilateral	02:02:33	21	knowledge of that, no.	
22	negotiation is it your experience that a patent	02:02:37	22	(Excerpt of prior testimony from	
23	holder would tend to inflate the value of its	02:02:42	23	June 17, 2003 was marked as	
24	patents?	02:02:43	24	Plaintiff's Exhibit No. 332 for	
25	A I think that is true when -- when		25	identification, as of this date.)	
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1	Q Mr. Smith, you have now been	02:25:12	1	determination of reasonableness.	02:28:18
2	handed what's been marked as Plaintiff's	02:25:13	2	Q So as long as the licensee can	02:28:21
3	Exhibit 332, and I'll represent that it is an	02:25:18	3	afford the payment the royalty rate is	02:28:24
4	excerpt from the proceedings of June 17, 2003	02:25:22	4	reasonable?	02:28:25
5	in the matter of certain reportable compact	02:25:26	5	MR. PEPE: Objection to form.	02:28:36
6	discs and rewritable discs ITC investigation	02:25:31	6	A I would say that in the context of	02:28:37
7	number 337 TA 474. Is this the same case that	02:25:36	7	and I think you need to take all this testimony	02:28:40
8	you referred to at the beginning of our session	02:25:41	8	in the context of the action in which it was	02:28:42
9	that involved an analyst by you of patent pools	02:25:46	9	given. As I remember here the royalty that was	02:28:49
10	or may have?	02:25:47	10	charges was somewhere north of 70 percent or	02:28:56
11	A This is the case that I referred	02:25:49	11	something like that. It's been a long time so	02:28:58
12	to in which I couldn't recall whether there was	02:25:51	12	I may not remember exactly, but in that context	02:29:03
13	a patent rule involved or not.	02:25:55	13	it is not reasonable if the licensee cannot	02:29:08
14	Q And so what we have done here is	02:25:59	14	operate at a profit.	02:29:21
15	included the excerpts that captures both your	02:26:04	15	Q If you can turn to page 1415?	02:29:26
16	direct and any of your testimony, and I see you	02:26:12	16	A Um-hmm, I have it.	02:29:27
17	are reviewing the document. Can you identify	02:26:17	17	Q At the bottom of the page	02:29:30
18	whether this is consistent with your	02:26:20	18	beginning line 17, if you could you read the	02:29:34
19	recollection of the testimony that you provided	02:26:22	19	six or seven lines after that to yourself?	02:29:45
20	in this matter?	02:26:25	20	A Yeah, I have it.	02:29:47
21	A It appears to be, I see as a	02:26:27	21	Q So, here in this testimony you	02:29:48
22	matter of fact you were correct in a 500	02:26:31	22	were indicating that a 15 to 20 percent royalty	02:29:53
23	million dollars a year when I retired I was	02:26:35	23	rate was, quote, outstandingly high rate, do	02:29:57
24	misremembering that.	02:26:37	24	you see that?	02:29:58
25	Q And was it your intent to testify		25	A In this case it certainly was,	
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1	truthfully and accurately in this ITC case?	02:26:43	1	yes.	02:30:02
2	A It was, yes.	02:26:46	2	Q And would that same rate be	02:30:05
3	Q You believe you accomplished that	02:26:48	3	outstandingly high in other situations?	02:30:10
4	goal?	02:26:50	4	MR. PEPE: Objection form.	02:30:17
5	A I hope so.	02:26:55	5	A Typically rates of one to 5	02:30:21
6	Q On page 1409 you were asked at the	02:27:07	6	percent of the selling price of the goods is a	02:30:27
7	middle of the page line 12, how can you tell if	02:27:11	7	reasonable rate in my experience. A rate of 20	02:30:29
8	a royalty is reasonable and your answer was,	02:27:14	8	percent of the selling price is I think is	02:30:31
9	well, a royalty is reasonable if it, as I said	02:27:19	9	quite high.	02:30:38
10	before, if it produces income for the licensor	02:27:22	10	Q And in fact would not be RAND?	02:30:41
11	and still allows the licensee to operate at a	02:27:26	11	MR. PEPE: Objection form.	02:30:42
12	profit so that he can continue to manufacture	02:27:29	12	Q Let me state it differently. In	02:30:45
13	use, lease or sell products that are covered,	02:27:32	13	this case did you come to a conclusion that 15	02:30:47
14	do you see that?	02:27:33	14	to 20 percent would not be a RAND rate?	02:30:51
15	A I do.	02:27:34	15	A In this case I did, yes.	02:30:54
16	Q Is that consistent with your	02:27:36	16	Q And this case involved patented	02:30:57
17	testimony and opinion in this case?	02:27:39	17	technology relating to CD disc drives; is that	02:31:01
18	A I think it is consistent. I think	02:27:42	18	right?	02:31:02
19	it may not be quiet as complete because I don't	02:27:48	19	A CD discs themselves I believe.	02:31:07
20	specify what level of income for the licensor.	02:27:59	20	That's a redundancy CDs themselves.	02:31:35
21	Q This seems to indicate as long as	02:28:02	21	Q In this case did Phillips face any	02:31:38
22	the licensee can operate at a profit the	02:28:05	22	RAND constraints on the rates that it could	02:31:44
23	royalty rate would be reasonable; is that a	02:28:08	23	charge?	02:31:46
24	fair reading?	02:28:12	24	A I don't recall whether Phillips	02:31:48
25	A Well that certainly is within the		25	had a RAND commitment or not.	
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1	Q Do you recall that there were a	02:32:27	1	Q And you have never been the	02:45:08
2	number of provisions that you considered to be	02:32:32	2	subject of a successful Daubert motion?	02:45:14
3	onerous in connection with the Phillips patent	02:32:36	3	A Never.	02:45:14
4	pool?	02:32:37	4	Q I have no further questions.	02:45:17
5	A I do, as I sit here I can't recall	02:32:40	5	MR. PEPE: And I have no	02:45:18
6	what they were but my recollection is that	02:32:43	6	questions.	02:45:19
7	there were some provisions such as audit	02:32:46	7	VIDEOGRAPHER: This marks the end	02:45:19
8	provisions and the like that I thought were	02:32:50	8	of tape number four. We're going off	02:45:20
9	quite onerous. I would have to read the	02:32:53	9	the record the time is 2:45.	02:45:31
10	agreements to refresh myself.	02:33:00	10	(Time noted: 2:45 p.m.)	02:45:31
11	Q Is there any single term in a	02:33:06	11		02:45:31
12	licensing agreement that's more important than	02:33:10	12	ROGER S. SMITH	
13	others?	02:33:11	13		
14	MR. PEPE: Objection to form.	02:33:13	14		
15	Q Strike that. If you can turn to	02:33:15	15	Subscribed and sworn to before me	
16	page 1439, line seven, line seven and the	02:33:30	16	this _____ day of _____ 2012.	
17	question was: Of all these provisions we've	02:33:33	17		
18	talked about, which do you think is most	02:33:33	18		
19	onerous, your answer is, clearly the royalty	02:33:36	19		
20	rate is, one can live with other provisions if	02:33:40	20		
21	the royalty rate is reasonable; do you see	02:33:44	21		
22	that?	02:33:45	22		
23	A I see that.	02:33:46	23		
24	Q And does that continue to be your	02:33:48	24		
25	opinion today?		25		
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1	A I'm not sure I would now subscribe	02:33:54	1	CERTIFICATE	
2	to the proposition if I did then I'm not sure	02:33:58	2	STATE OF NEW YORK)	
3	what I meant when I said others, but I'm not	02:34:01	3)ss:	
4	sure I would now subscribe to the position that	02:34:03	4	COUNTY OF RICHMOND)	
5	one could live with any other provision if the	02:34:04	5	I, DANIELLE GRANT, a Certified	
6	royalty rate was reasonable I don't think	02:34:07	6	Shorthand Reporter, and Notary	
7	that's true. I think particularly in the	02:34:11	7	Public within and for the State of	
8	context of RAND it's the terms and conditions	02:34:13	8	New York, do hereby certify:	
9	including royalty rates that have to be	02:34:16	9	That ROGER S. SMITH, the witness	
10	reasonable.	02:34:36	10	whose deposition is hereinbefore	
11	Q Now, why don't we take a five	02:34:39	11	set forth, was duly sworn by me and	
12	minute break and then I think we can probably	02:34:41	12	that such deposition is a true	
13	wrap up I want to review my notes?	02:34:44	13	record of the testimony given by	
14	VIDEOGRAPHER: We're going off the	02:34:45	14	such witness.	
15	record the time is 2:34.		15	I further certify that I am not	
16	(Whereupon, at 2:34 p.m., a recess		16	related to any of the parties to	
17	was taken to 2:44 p.m.)		17	this action by blood or marriage	
18	(The deposition resumed with all		18	and that I am in no way interested	
19	parties present.)	02:44:52	19	in the outcome of this matter.	
20	VIDEOGRAPHER: We're now back on	02:44:53	20	In witness whereof, I have hereunto	
21	the record the time is 2:44.	02:44:58	21	set my hand this 22 day of August,	
22	Q Mr. Smith, to your knowledge has	02:44:59	22	2012.	
23	any of your testimony ever been excluded by a	02:45:03	23		
24	court?	02:45:04	24		
25	A Not to my knowledge, no.		25		
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